Pennant Foods Co., a wholly-owned sbsidiary of CS Bakery Holdings, Inc., a wholly-owned subsidiary of Chef Solutions Holdings, LLC *and* International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL–CIO. Cases 34–CA–11385, 34–CA–11417, 34–CA–11504, and 34–RC–1925

May 12, 2008

DECISION, ORDER, AND DIRECTION OF THIRD ELECTION

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

On September 17, 2007, Administrative Law Judge Michael A. Marcionese issued the attached decision. The Respondent filed exceptions and a supporting brief,[1] the General Counsel filed an answering brief, and the Respondent filed a reply brief. The Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order[3] as modified and set forth in full below.[4]

[1] The General Counsel filed a motion to strike Respondent's exceptions and brief, alleging that the exceptions were improperly single-spaced and contained argument, contrary to Sec. 114(d) and 102.46(b)(1), respectively, of the Board's Rules and Regulations. Thereafter, the Respondent resubmitted its exceptions double-spaced. With respect to the claim that the exceptions contain argument, the General Counsel did not identify which of the Respondent's 77 exceptions failed to comport with the Rules. Although our review discloses that the Respondent's exceptions were not literally compliant with the Rules, we find that they are sufficient to satisfy the "substantial compliance" standard. See, e.g., *Consolidated Bus Transit*, 350 NLRB No. 1064 fn. 2 (2007). We have, however, properly considered only arguments made in the Respondent's brief.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

There are no exceptions to the judge's findings that: (1) Questor Company was not properly named a Respondent; (2) the Respondent did not violate Sec. 8(a)(1) by threatening employees with retaliation if they talked about the Charging Party or engaged in union activity; (3) the Respondent did not violate Sec. 8(a)(1) or engage in objectionable conduct by threatening employees with loss of employment if they selected the Charging Party as their collective-bargaining representative; and (4) the Respondent did not violate Sec. 8(a)(1) or engage in objectionable conduct by conveying to employees during a powerpoint presentation that their selection of the Charging Party would be futile.

Because the judge's findings, which we adopt, provide ample grounds for setting aside the election, we find it unnecessary to pass on the judge's recommendation to overrule the Charging Party's Objection 13. Further, in the absence of exceptions, we adopt pro forma the judge's recommendation to overrule the Charging Party's Objection 14.

In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) by threatening employees during a powerpoint presentation with a loss of benefits if they selected the Union, we do not rely on the judge's statement that it was "natural human tendency to extemporize from prepared scripts in emotional situations." The judge made this statement in support of his finding that the testimony of Respondent's Operations Manager Fred Macey was not credible. In adopting the judge's credibility finding, we rely only on the judge's other reasons for discrediting Macey.

[3] In adopting the judge's finding that a bargaining order pursuant to *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), is not warranted, we note that the Charging Party does not request a remand to present required evidence of its majority status. See *Gourmet Foods*, 270 NLRB 578, 585 (1984).

[4] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

We shall modify the judge's recommended Order and substitute a new notice to include the Board's standard remedial language for the violations found.

ORDER

The National Labor Relations Board orders that the Respondent, Pennant Foods Company, a wholly-owned subsidiary of CS Bakery Holdings, Inc., a wholly-owned subsidiary of Chef Solutions Holdings, LLC, North Haven, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating employees about activities on behalf of, or support for, the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL–CIO (the Union), or any other labor organization.

(b) Threatening employees with the loss of benefits or plant closure if they select the Union or any other labor organization to represent them in collective bargaining.

(c) Denying reinstatement to employees for supporting the Union or any other labor organization.

(d) Creating or discriminatorily applying job descriptions and a light-duty policy in order to prevent employees from returning to work from workers' compensation leave because of their union membership and activities.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Lee Mabry full reinstatement to his former job as a machine operator or to a light duty assignment consistent with any medical restrictions imposed by a physician, or, if his former job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Lee Mabry whole for any loss of earnings and other benefits resulting from the discriminatory refusal to reinstate him, less any net interim earnings, plus interest in the manner set forth in the remedy section of the judge's decision.

(c) Rescind the machine operator job description and the worker's compensation light-duty policy that was utilized to deny Lee Mabry reinstatement in December 2005.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful denial of reinstatement, and within 3 days thereafter notify Lee Mabry in writing that this has been done and that the refusal to reinstate him will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in North Haven, Connecticut, copies of the attached notice marked "Appendix"[5] in both English and Spanish. Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 21, 2005.

(g) Within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which the attached notice is to be read to the employees by the current plant director, production manager, or corporate vice president for human resources, with translation available for Spanish-speaking employees, and with a Board agent present during the reading.

(h) Within 14 days from the date of this Order, supply the Union the full names and addresses of current unit employees at the North Haven facility, updated every 6 months, for a period of 2 years from the date the notice is posted, or until the Board has issued an appropriate certification following a free and fair election, whichever comes first.

(i) Provide the Union with notice of, and equal time and facilities to respond to, any address made by the Respondent to employees on the question of union representation, for a period of 2 years from the date the notice is posted, or until the Board has issued an appropriate certification following a free and fair election, whichever comes first.

(j) Upon reasonable advance notice from the Union, afford the Union and its representatives reasonable access to the Respondent's bulletin boards and all places where notices to employees are customarily posted at the North Haven facility for a period of 2 years from the date the notice is posted, or until the National Labor Relations Board has issued an appropriate certification following a free and fair election, whichever comes first.

(k) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election in Case 34–RC–1925 shall be set aside and this case is remanded to the Regional Director for Region 34 to conduct a third election at a time and place to be determined by him.

[Direction of Third Election omitted from publication.]

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate you about your activities on behalf of, or support for, the International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL–CIO (the Union), or any other labor organization.

WE WILL NOT threaten you with the loss of benefits or plant closure if you select the Union or any other labor organization to represent you in collective bargaining.

WE WILL NOT deny you reinstatement for supporting the Union or any other labor organization.

WE WILL NOT create or discriminatorily apply job descriptions and a light-duty policy in order to prevent you from returning to work from workers' compensation leave because of your union membership and activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days of the date of the Board's Order, offer Lee Mabry full reinstatement to his former job as a machine operator or to a light-duty assignment consistent with any medical restrictions imposed by a physician, or, if his former job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Lee Mabry whole for any loss of earnings and other benefits resulting from our discriminatory refusal to reinstate him, less any net interim earnings, plus interest.

WE WILL rescind the machine operator job description and the worker's compensation light-duty policy that was utilized to deny Lee Mabry reinstatement in December 2005.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful refusal to reinstate Lee Mabry, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the refusal to reinstate will not be used against him in any way.

WE WILL, within 14 days after service by the Region, hold a meeting or meetings, scheduled to ensure the widest possible attendance, at which this notice to employees is to be read to you by our current plant director, production manager, or corporate vice president for human resources, with translation available for Spanish-speaking employees, and with a Board agent present during the reading.

WE WILL, within 14 days from the date of the Board's Order, supply the Union the full names and addresses of current unit employees at the North Haven facility, updated every 6 months, for a period of 2 years from the date the notice is posted, or until the Board has issued an appropriate certification following a free and fair election, whichever comes first.

WE WILL provide the Union notice of, and equal time and facilities to respond to, any address we make to you on the question of union representation, for a period of 2 years from the date the notice is posted, or until the Board has issued an appropriate certification following a free and fair election, whichever comes first.

WE WILL, upon reasonable advance notice from the Union, afford the Union and its representatives reasonable access to our bulletin boards and all places where notices to employees are customarily posted for a period of 2 years from the date the notice is posted, or until the Board has issued an appropriate certification following a free and fair election, whichever comes first.

PENNANT FOODS COMPANY

Jennifer Dease, Esq. and *Margaret Lareau, Esq.,* for the General Counsel.

Gary Glaser, Esq. and *Paul Galligan, Esq. (Seyfarth Shaw, LLP),* for the Respondent-Employer.

Thomas W. Meiklejohn, Esq. (Livingston, Adler, Pulda Meiklejohn & Kelly), for the Charging Party-Petitioner.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. I heard this case in Hartford, Connecticut, over 8 days between October 25, 2006, and January 10, 2007. The Charging Party/Petitioner, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America, AFL–CIO (the Union), filed the initial charges in Cases 34–CA–11385 and 34–CA–11417 on January 9 and February 3, 2006, respectively, and amended the charge in Case 34–CA–11417 on March 28 and April 28, 2006. A consolidated complaint based upon these charges issued on April 28, 2006, alleging that the Respondent, Pennant Foods, a wholly-owned subsidiary of CS Bakery Holdings, Inc, a wholly-owned subsidiary of Chef Solutions Holdings, LLC,[1] a Questor Company, violated Section 8(a)(1) of the Act through statements made by several of its supervisors and managers during a preelection campaign in January 2006.[2] The consolidated complaint also alleged that the Respondent violated Section 8(a)(1) and (3) of

[1] As will be discussed, infra, I have amended the caption to delete "a Questor Company" from the name of Respondent.

[2] All dates are in 2006, unless otherwise noted.

the Act by refusing to permit its employee Lee Mabry to return to work from leave for a work-related injury on December 21, 2005, and again on April 10 because of his activities on behalf of the Union. In connection with this allegation, the consolidated complaint alleged that the Respondent discriminatorily relied upon a new light-duty policy and job description that purportedly were formulated during Mabry's absence. The Respondent filed its answer to the consolidated complaint on May 15, denying that it committed the unfair labor practices alleged in the complaint and asserting several affirmative defenses. The Respondent also objected to the inclusion of "a Questor Company" in the Respondent's name.

By Order dated May 22, the consolidated complaint was further consolidated with objections that had been filed by the Union to the election conducted on January 20 in Case 34–RC–1925. The petition in that case had been initially filed by the Union on October 22, 2001, and an election had been conducted on November 29, 2001, pursuant to a Decision and Direction of Election issued by the Board's Regional Director on November 14, 2001. The Union had filed objections and unfair labor practice charges based on conduct preceding that election. The election conducted on January 20 was a stipulated rerun election. As will be discussed in more detail later, the Union's objections that were set for hearing in the May 22 Report on Objections included conduct alleged in the consolidated complaint as unfair labor practices during the January preelection period; conduct during the same period that was not alleged to be an unfair labor practice; and conduct that had been the subject of unfair labor practice charges that occurred during the period between the first election in 2001 and the notice of the rerun election. Some of these earlier unfair labor practice charges had been settled and others were litigated and resulted in the Board Order reported at 347 NLRB 460 (2006). The Board, in an Order dated August 23, after considering the Respondent's exceptions to the Objections Report, affirmed the Regional Director's determination that a hearing on the Union's objections was warranted and remanded Case 34–RC–1925 for hearing.

On May 17, the Union filed the charge in Case 34–CA–11504, which was amended on July 31. On August 3, a complaint issued in that case alleging that the Respondent, through its Operations Manager Fred Macey, committed additional violations of Section 8(a)(1) of the Act during the preelection period in January 2006. On the same date, an order further consolidating cases issued to consolidate Case 34–CA–11504 with the previously issued consolidated complaint and objections report.[3] The Respondent filed its answer to the new complaint on August 17, again objecting to inclusion of "a Questor Company" in the caption and denying that it committed the unfair labor practices alleged. The Respondent also asserted the same affirmative defenses that had been raised in its answer to the original consolidated complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, manufactures frozen dough and other bakery products at its facility in North Haven, Connecticut, where it annually purchases and receives goods valued in excess of $50,000 directly from points located outside the State of Connecticut. The Respondent admits[4] and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. The Respondent's name

As noted above, the complaints in the instant case alleged that the Respondent is "a Questor Company." Counsel for the General Counsel stated at the hearing that Questor was the only partner in Chef Solutions LLC, the parent company of Pennant Foods' parent, CS Bakery Holdings, Inc.[5] She cited a leaflet distributed to employees during the January preelection campaign which identified Questor as a major shareholder of the Company and referred to support received from Questor in the Respondent's efforts to remain competitive. The Respondent, in its answers to the complaints, at the hearing, and in its brief has objected to the General Counsel's inclusion of Questor in the definition of the Respondent. According to the Respondent's counsel, no evidence has been offered by the General Counsel or the Charging Party that would justify naming Questor a respondent.

The General Counsel's position in this case differs from the position it took in the unfair labor practice proceeding before another administrative law judge in November 2005. In that case, the General Counsel stipulated that Questor was merely a shareholder of the Respondent and amended the complaint to delete reference to Questor. *Pennant Foods Co.,* 347 NLRB 460, 460 fn. 1 (2006). In the instant case, General Counsel has offered no evidence that would link Questor, or any supervisor or agent of that entity, with the unfair labor practices alleged to have been committed. More specifically, there is no evidence in this record that would warrant a piercing of the corporate veil to impose liability for any of the alleged unfair labor practices on any individual shareholder or limited liability partner. See *White Oak Coal Co.,* 318 NLRB 732 (1995). Cf. *A. J. Mechanical, Inc.,* 345 NLRB 295 (2006), sub nom. reversed in pertinent part *Carpenters Local 2471,* 481 F.3d 804 (D.C. Cir. 2007).

[3] The General Counsel amended the consolidated complaints at the hearing to seek special remedies for the unfair labor practices alleged.

[4] While admitting the commerce facts and conclusions, the Respondent continued to deny in its answer that a Questor Company was properly included in the name of the Respondent.

[5] The record reveals that CS Bakery Holdings and Chef Solutions are headquartered in Schaumberg, IL and that management officials from that corporate headquarters participated in the preelection campaign in January.

I find, based on the limited evidence in the record, that "Questor," at most, was a shareholder or owner of the Respondent's parent company at the time the unfair labor practices were allegedly committed.[6] As such, it was not properly named a Respondent because there is no evidence that Questor and the Respondent failed to maintain separate identities and that adherence to the corporate structure in this case would "sanction a fraud, promote injustice, or lead to evasion of the Respondent's legal obligations." *White Oak Coal Co.,* supra. Nor is there any evidence that would establish a single employer, alter ego, or joint employer relationship between Questor and the Respondent. Accordingly, I have amended the caption to delete Questor from the definition of the Respondent.

2. History preceding the rerun election

The Respondent manufactures frozen rolls and other bakery goods at the North Haven facility involved in this proceeding. Subway Sandwich Shops is the Respondent's main customer. The Union has been engaged in a determined effort to represent a unit of the Respondent's production and maintenance employees in North Haven since September 2001. At the time of the hearing in this case, there were approximately 143 employees in the unit. The alleged discriminatee, Lee Mabry, has been involved in the Union's organizing campaign from the beginning. As part of its effort to organize the Respondent's employees, the Union embarked on a "corporate campaign" aimed at bringing public pressure on the Respondent to recognize the Union. This campaign included visits by bargaining unit members and union representatives to the corporate offices of the Respondent's parent and shareholders, such as Questor. In addition, the Union enlisted politicians to hold hearings to "investigate" the Respondent's treatment of its employees. There is no dispute that Mabry was prominent in this campaign and, as the parties stipulated, was the "face" of the Union in the media.

As noted above, the Union filed a petition seeking to represent the Respondent's employees on October 22, 2001. An election was held on November 29, 2001, which the Union lost by a vote of 99–63. The Union filed timely objections to the election as well as a number of unfair labor practice charges. The charges were resolved through an informal settlement agreement containing a nonadmissions clause, approved by the Board's Regional Director over the Union's objections, on December 12, 2003. It appears that the Union's election objections were resolved by a stipulation for a new election, which had been held in abeyance until the Union filed a request to proceed in late December 2005. Within a year of the approval of the settlement agreement, the Union filed additional charges which were resolved by execution of a formal settlement stipulation on February 18, 2005, providing for entry of a Board Order with enforcement by the court of appeals. The settlement stipulation also contained a nonadmissions clause. The Union again objected to the settlement, contending that the remedies provided by the agreement were insufficient to dissipate the effects of the Respondent's alleged unfair labor practices. The Board's decision approving the formal settlement over the Union's objections issued on January 10, 2006, shortly before the election at issue in this proceeding.[7]

At the hearing, I rejected the General Counsel's proffer of the informal settlement agreement, the formal settlement stipulation, and the order and judgment enforcing the formal settlement on the grounds that the settlement of unfair labor practice charges where the Respondent did not admit it had violated the Act was not relevant to determining whether the Respondent violated the Act as alleged in the instant complaints, or whether the special remedies sought by the General Counsel in this case were warranted, or as proof of objectionable conduct. I adhere to that ruling. See *Sheet Metal Workers Local 28 (Astoria Mechanical Corp.),* 323 NLRB 204 (1997). However, I have taken administrative notice of the documents for the purpose of establishing the procedural history leading up to the instant proceeding. As I advised the parties when making my ruling at the hearing, if the General Counsel or the Charging Party wished to rely on the conduct alleged in the earlier cases to support the positions taken here, they would have to offer proof of the conduct and not simply rely on the existence of the settlement agreements.[8]

While the formal settlement agreement was pending before the Board, the Union filed additional unfair labor practice charges against the Respondent which led to issuance of a consolidated complaint on August 31, 2005. That complaint went to trial before Administrative Law Judge Joel Biblowitz in November 2005. Judge Biblowitz issued his decision on January 19, the day before the rerun election, finding that the Respondent violated Section 8(a)(1) of the Act on May 24 and 25, 2005, by threatening unfair labor practice strikers with permanent replacement if they refused to abandon a strike.[9] Judge Biblowitz also found that the Respondent violated Section 8(a)(1) and (3) of the Act by issuing written warnings to employee Jack Toporovsky on May 9 and 12, 2005; by removing a laptop computer from the office where Toporovsky worked; by removing telephones from the maintenance department on May 10, 2005; and by failing and refusing to reinstate Toporovsky and fellow maintenance employee Gregory Borukhovich to their prestrike positions since June 7, 2005. On June 27, 2006, the Board adopted Judge Biblowitz' decision in its entirety. *Pennant Foods Co.,* 347 NLRB 460.

The Respondent's campaign to convince its employees to vote against union representation at the January 20 rerun election generated the current round of charges. The Union again lost the election, by a vote of 84–54, and filed timely objections. The Union also sought, as a remedy for the charges it

[6] Evidence offered at the hearing indicates that Chef Solutions may have sold the assets of Pennant Foods to another entity identified as Fresh Start Bakeries in October 2006, after the unfair labor practices alleged here. Any question of liability on the part of any current owner to remedy the violations found here can be resolved at the compliance stage of these proceedings.

[7] The court of appeals entered its judgment enforcing the Board's Order on February 8.

[8] The Charging Party did offer evidence with respect to two of the settled unfair labor practices as part of its objections case.

[9] Judge Biblowitz found that a strike engaged in from May 24 to June 6, 2005, by several of the Respondent's maintenance employees to protest discriminatory warnings issued to one of them was an unfair labor practice strike.

filed, a *Gissel* bargaining order.[10] The General Counsel, while asking for special remedies in light of the history of the case, does not seek such a remedy. At the hearing, I ruled that the Charging Party was precluded from seeking a bargaining order because of the General Counsel's conscious decision to refrain from seeking such a remedy. See *ATS Acquisition Corp.,* 321 NLRB 712 fn. 3 (1996).

B. The 8(a)(1) Allegations

1. Case 34–CA–11504

The sole allegation in this complaint is that the Respondent, through Fred Macey, its operations manager at the time,[11] violated Section 8(a)(1) of the Act in December 2005 or January 2006 by threatening employees with retaliation if they talked about the Union and engaged in union activity, and prohibited employees from talking about the Union and engaging in union activities. This allegation is based upon an incident involving Macey and former employee Gustavo Caporal, who was the General Counsel's sole witness in support of this allegation. Caporal was terminated by the Respondent on May 4 for allegedly making false entries in company records regarding the temperature of frozen dough being loaded onto trucks for shipment. Caporal, in his testimony, disputed the Respondent's claims against him, suggesting that he may have been set up to be terminated. However, the allegations in this charge relating to his discharge were dismissed by the Regional Office and not appealed by the Union.

As to the specific allegation at issue, Caporal testified that, a few weeks before the January 20 election, after he and other employees began campaigning for the Union, Macey approached him as he was walking through the production area on his way back to the warehouse after a break. Macey put his arm around Caporal and said, "Gustavo, you know me," to which Caporal responded affirmatively. Macey then said he did not want to get into an argument with Caporal, he was just doing his job, but that he just wanted to tell Caporal that he didn't want Caporal talking with the people in production about the Union.[12] Macey told Caporal that he could do this on his breaks or during lunch. Caporal said, "[O]kay," and the conversation ended. According to Caporal, Macy did not speak to him again about this. Caporal testified that this conversation occurred in English. While acknowledging that he sometimes has difficulty communicating in English, he understands the language fairly well.[13] On cross-examination, Caporal admitted that he did not mention this conversation to anyone for almost 6 months, and reported it only after he was fired.

Macey did not deny having a conversation with Caporal before the election about his being on the production floor. Macey testified that he spoke to Caporal in response to complaints he had received from the mixer operator and a supervisor that Caporal was interfering with production. According to Macey, he merely took Caporal aside and told him that he works in the shipping department and should remain there, that there was no reason for him to be talking to employees on the production floor. Macey testified that he told Caporal that he could go to the cafeteria and talk to employees on his breaks. Macey denied mentioning the Union in this conversation, asserting that the complaints he received did not indicate what Caporal was talking about to the employees, only that he was disturbing them while they were working.

The General Counsel argues that Macey's statements to Caporal were an implied threat of retaliation for talking about the Union and amounted to the promulgation of a discriminatory "no-talking" rule. See, e.g., *Flamingo Hotel-Laughlin,* 324 NLRB 72, 110 (1997), enf. denied in part on other grounds 148 F.3d 1166 (D.C. Cir. 1998). This argument depends entirely on the credibility of Caporal. Although I do not believe Caporal fabricated his testimony, I am reluctant to credit his testimony regarding this conversation. As noted previously, Caporal is not fluent in English and there is a real possibility that he misunderstood Macey's admonition. I also note the absence of evidence that other employees were prohibited from "talking" about the Union, and the absence of evidence that the Respondent customarily allowed employees from other departments to come onto the production floor and engage production employees in nonwork-related conversation while they were working. Caporal's testimony without any supporting evidence is thus not sufficiently reliable to support the allegation in the complaint. Moreover, although I did not find Macey a credible witness on other matters, his testimony regarding the conversation with Caporal had the ring of truth. I find it more probable than not that, as Macey testified, he simply reminded Caporal that he needed to remain in his work area unless he was on break and that he should not disturb other employees who were working.

Based on the above, I have determined that the General Counsel has failed to meet his burden of proof on this allegation. Because this is the only unfair labor practice allegation in Case 34–CA–11504, I shall recommend that the complaint in that case be dismissed in its entirety.

2. Allegations involving Supervisor Rodriguez

The consolidated complaint in Case 34–CA–11385 and 34–CA–11417 alleges, at paragraphs 7 and 8, that the Respondent, through its admitted supervisor, Jennifer Rodriguez, violated Section 8(a)(1) of the Act by interrogating employees and threatening them with loss of employment and closure of the facility if they selected the Union to represent them.[14] Respondent has denied these allegations. The General Counsel's sole witness in support of these allegations was former employee Ricardo Rodriguez, who testified to two encounters with Supervisor Rodriguez in the weeks preceding the January election.[15]

Ricardo Rodriguez was employed by the Respondent from October 31, 2005, until he voluntarily quit in April or May, a

[10] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[11] Macey became plant director in July 2006 after Price left the Company.

[12] The Tr. 190, LL. 12–14, erroneously shows the word "position" in place of "production." Based on the General Counsel's unopposed motion, I shall correct the transcript accordingly.

[13] I observed that Caporal generally was able to testify in English although a few times he did not understand the questions he was asked and needed to use the services of the interpreter.

[14] Counsel for the General Counsel, in her posthearing brief, withdrew the allegation that Respondent threatened loss of employment.

[15] Ricardo and Jennifer Rodriguez are not related.

few months after the election. He was a quality control inspector on the second shift. Jennifer Rodriguez was his immediate supervisor. Ricardo Rodriguez testified that Supervisor Rodriguez called him into her office on January 10 at about 4 or 5 p.m. No one else was present.[16] According to Ricardo Rodriguez, after initially talking about work-related issues, Supervisor Rodriguez asked him what he knew about the Union. Ricardo Rodriguez told her that some people had spoken to him about it and that he had a relative who was in a union. The supervisor then asked if he knew that there was a union trying to get into the factory. She mentioned that there was an election coming up and told Ricardo Rodriguez that she wanted him to vote "no."

Ricardo Rodriguez testified that Supervisor Rodriguez also told him, in this conversation, that if the Union got into the Company, the employees could lose their medical benefits and that the Company's "open-door policy" could end. She told him that the Union would decide what the medical benefits would be. Ricardo Rodriguez also recalled that his supervisor told him the Union could end up causing the factory to close and she gave as an example a company in nearby Meriden, Connecticut, that made car parts and was closing. Ricardo Rodriguez asked Supervisor Rodriguez if it was the same union that was trying to get into the Respondent's facility and she said it was. According to Ricardo Rodriguez, Supervisor Rodriguez did not explain how the Union could cause the factory to close. Ricardo Rodriguez told his supervisor that he had worked at the factory that was closing for about a week and left because he heard rumors that it was closing. He told her he did not know why the factory was closing. On cross-examination, Ricardo Rodriguez conceded that Jennifer Rodriguez did not say directly that the Respondent was going to close if the Union came into the factory. He also recalled that, at the end of the meeting, Jennifer Rodriguez asked him to think about it and said that she would like him to vote "no."

Ricardo Rodriguez testified to one other conversation with Jennifer Rodriguez that occurred about a week before the election. This conversation, also in Spanish, took place in her office with no one else present. Again, after initially discussing a work issue, she asked him how things were going on the floor. When Ricardo Rodriguez asked her what she meant, Jennifer Rodriguez replied, "[Y]ou know, the Union." Ricardo Rodriguez told her that things were good, that some people had talked to him about it saying good things about the Union while others said bad things about it. Ricardo Rodriguez told her he had made up his mind because he did not want to lose benefits. Jennifer Rodriguez told him, "[W]hen you vote, make sure you put a big X where it says no."

Jennifer Rodriguez testified for the Respondent. She has been employed by the Respondent for more than 10 years and had been the supervisor of sanitation and quality control for about 3-1/2 years at the time of the hearing. She testified that she "did not, at any time talk to Ricardo Rodriguez about the Union." She repeated this answer, as if by rote, in response to each leading question from counsel as to whether she made the statements attributed to her by Ricardo Rodriguez. According to Jennifer Rodriguez, she only spoke to Ricardo Rodriguez about production. Jennifer Rodriguez acknowledged that she speaks Spanish when talking to the Respondent's Spanish-speaking employees.[17] Jennifer Rodriguez also testified that, in early January, after learning of the rerun election, she attended a meeting with Price and the Respondent's lawyers at which the supervisors and managers were instructed about how to conduct themselves lawfully during the campaign. She recalled being told not to have meetings with employees about the Union. The supervisors were also told that they could answer employees' questions if they knew the answer. Otherwise, the supervisor was to refer the employee to human resources.

As between these two witnesses, I found Ricardo Rodriguez to be the more credible witness. Jennifer Rodriguez' rote denials were not persuasive. In addition, her testimony on another matter, the preparation and distribution of the disputed job descriptions, was deliberately misleading. For example, at first she testified that Maria Giaimo gave her the new job descriptions. Later, when the Respondent's counsel pointed out that Giaimo did not work there when the job descriptions were supposed to have been created, she changed her testimony. At another point in her testimony, Jennifer Rodriguez testified that she didn't remember if Operations Manager Macey read from his power point presentation line by line, yet she was certain he didn't deviate from it. I also noted her evasiveness when answering questions on cross-examination. In total, it appeared that she formulated her answers to advance whatever position the Respondent was taking on an issue. In contrast, Ricardo Rodriguez appeared to be candid with his answers, attempting as best he could to recall events and conversations. Although the Respondent attempted to show that he was biased against the Respondent because he had complained about Jennifer Rodriguez' supervision in his resignation letter, I did not detect any bias in his testimony. Moreover, contrary to the Respondent's argument, Ricardo Rodriguez did refer to the unfair labor practice allegation in his resignation letter, when he complained that the Respondent had violated his rights in the election by telling him to vote "no." Although he did not name his supervisor as guilty of this affront, it is clear from his testimony that, on two occasions, she told him to vote "no."

Having credited Ricardo Rodriguez, I find, based on his testimony, that the Respondent violated Section 8(a)(1) when his supervisor called him into her office on two occasions and interrogated him about the Union. Ricardo Rodriguez was not an open and notorious union supporter when Jennifer Rodriguez first asked him, on January 10, what he knew about the Union. Nor had he exhibited any prounion sympathies when she called him in again, a week before the election, and asked him how things were going with the Union on the shop floor. Jennifer Rodriguez' questioning of her subordinate was not part of an isolated and spontaneous conversation but appears to have been deliberately calculated to ascertain Ricardo Rodriguez' union sympathies. The questioning was all the more coercive because

[16] This conversation was in Spanish. Although Ricardo Rodriguez speaks and understands English well, he testified to this conversation in Spanish with the court interpreter translating into English.

[17] Unlike Ricardo Rodriguez, Jennifer Rodriguez testified almost entirely through the interpreter.

it was coupled with an admonition to vote "no" and occurred in the context of an implied threat of plant closure if the Union prevailed in the upcoming election. Accordingly, under the totality of circumstances, including the Respondent's history of unfair labor practices, I conclude that Jennifer Rodriguez' interrogation of Ricardo Rodriguez violated the Act as alleged in the complaint. *Medcare Associates,* 330 NLRB 935, 939–940 (2000); and *Sunnyvale Medical Center,* 277 NLRB 1217 (1985). Cf. *Heartshare Human Services of New York,* 339 NLRB 842, 843–844 (2003).

As intimated above, I have also found, based on Ricardo Rodriguez' credited testimony, that Respondent unlawfully threatened employees with plant closure when Jennifer Rodriguez told him, without explanation, that the Union could end up causing the Respondent to close the facility.[18] Although her statement did not directly threaten that the Respondent *would* close the plant if the Union won the election, she clearly implied that would be the result. This prediction was not based on any objective facts but rather appeared to be based solely on the Union's history at another nearby facility. Without any further explanation, an employee could reasonably believe that the Respondent would rather close the plant than deal with this Union. The Board and the courts have historically found such statements unlawful *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969); *Homer D. Bronson Co.,* 349 NLRB 512, 513–514 (2007); and *Daikichi Sushi,* 335 NLRB 622, 623–624 (2001). Accordingly, I find that the Respondent has violated the Act as alleged in the complaint.

3. Alleged threat by Price

The consolidated complaint in Cases 34–CA–11385 and 34–CA–11417 alleges, at paragraph 9, that the Respondent, through Plant Director Price, threatened employees with loss of employment if they selected the Union as their representative. The evidence offered at the hearing indicates that this threat is alleged to have occurred during an employee communication meeting Price held with employees in early January, shortly after the rerun election was announced. The main witness for the General Counsel in support of this allegation is Gregory Borukhovich, one of the unfair labor practice strikers found to have been unlawfully denied reinstatement in the earlier unfair labor practice proceeding before Judge Biblowitz.

Borukhovich testified that he attended a meeting in the lunchroom with about 20–30 other employees, in early January, at which Price informed employees of a wage increase and improvements in benefits.[19] Price also talked about the Respondent's accomplishments in the past year. During the question and answer portion of the meeting, after Price mentioned a letter he sent to the employees about the recent holidays, Borukhovich spoke up, saying, "[W]hat holiday, I had one day off." Price then mentioned the upcoming election and told the employees that he wanted to work with them and that, if they wanted to work with him, to vote "no." At that point, Borukhovich asked, "[I]f I vote 'yes', will you fire me?" According to Borukhovich, Price did not answer this question. Instead, he became annoyed and told Borukhovich, "[T]his is my meeting. I am paying for this meeting." Borukhovich admits he also got angry but claimed he could not recall what he said. He acknowledged that he and Price argued back and forth to the point he stopped paying attention to what was said. The only thing he remembered clearly was the above-quoted question he asked Price, which initiated the argument, and the fact that Price did not answer the question. On cross-examination, Borukhovich denied that Price said the election would be by secret ballot. However, he acknowledged that Price did say at one point that "no one will know how you voted."

The General Counsel called two other witnesses to "corroborate" Borukhovich's testimony. Jack Toporovsky, the other unfair labor practice striker who was found to have been unlawfully denied reinstatement in the prior case, testified that he was at this meeting and recalled there being an exchange between Borukhovich and Price, but he did not recall what was said. In his pretrial affidavit, Toporovsky had stated that he did not recall being present at any meeting at which Borukhovich spoke up about whether he would be fired if he voted for the Union. Luther Harris, who had been employed by the Respondent for 17 years when he testified at the hearing, recalled entering the meeting when it was already in progress. He did recall Borukhovich speaking up at the meeting after Price mentioned the upcoming election. When Price told the employees they had a right to vote for the Union but asked them to vote "no," Borukhovich asked, "[I]f I vote yes, will you fire me?" Price did not answer. According to Harris, Borukhovich then said, "I'm going to vote for the Union, you fire me." Price still did not answer this question. Instead, Price said, "[T]his is my meeting and I'm not going to talk about the Union at this time." Price then changed the subject and went on with the meeting.[20]

Price testified for the Respondent regarding this allegation. Price recalled holding an employee communication meeting in January at which Borukhovich got up and started to make a statement during the question and answer portion of the meeting. Price admitted cutting him off by saying, "[T]his is my meeting. If you have a question, ask it, but don't make statements." According to Price, Borukhovich started to make his statement again and Price again cut him off. Finally, Borukhovich sat down and the meeting continued. Despite being able to recall the interruption and his response, Price surprisingly could not recall what Borukhovich said before he cut him off. Despite this lack of memory, Price was able to deny that Borukhovich said, "[I]f I vote yes, you fire me," or words to that effect. The Respondent called no other witnesses who were at this meeting. Jennifer Rodriguez, who was identified by other witnesses as being at this meeting, was not asked any questions about it.

There is very little dispute regarding the facts of this allegation. All witnesses who testified recalled Borukhovich speaking up at the meeting and Price cutting him off by saying, "[T]his is my meeting," or words to that effect. Although Price claimed he could not recall what Borukhovich said, I find his lack of

[18] The complaint does not allege that Jennifer Rodriguez' statement that employees could lose their medical benefits was unlawful.

[19] The General Counsel does not allege that the wage and benefit increases announced at this meeting were unlawful. It appears that they were part of an established practice at the facility.

[20] The Respondent's counsel chose not to cross-examine Harris.

recall not credible. Borukhovich's testimony that he asked Price if he would be fired for voting yes is corroborated by Harris, a long-term employee of the Respondent whom I found to be very credible. There is no dispute that, whatever Borukhovich said, Price did not respond to it directly. The issue remains, however, whether Price's silence, in the face of such a statement, amounts to ratification or adoption of the statement and a threat of job loss for voting for the Union.

The General Counsel and the Charging Party argue that Price's failure to expressly disavow the suggestion in Borukhovich's question that a vote in favor of the Union would lead to his termination amounts to agreement with the statement. According to the General Counsel, Price's silence reinforced the message that, if employees wanted to work with him to improve the Company, they would vote "no." The only case cited by the General Counsel in support of this argument is *Homer D. Bronson Co.,* supra, where the Board relied on an exchange between an employee and the president of the company to establish that the employer's statements at a meeting threatened plant closure. In that case, however, the employer's president did not remain silent when the employee asked if he was saying that the company would move or close if the Union came in. There, the president responded, "[I]t could happen." This is a far cry from the situation here. As admitted by Borukhovich, not only did Price not respond to the question, but he reminded the employees that "no one will know how you voted." In addition, Price interrupted Borukhovich, cutting off his question, by stating that it was Price's meeting, attempting to get the meeting back on track. Under all the circumstances, I can not find that Price's silence amounted to an unlawful threat, express or implied, that a vote for the Union would result in loss of employment. Accordingly, I shall recommend that this allegation be dismissed.

4. Alleged threats during the Respondent's preelection campaign meetings

There is no dispute that, as part of its campaign to convince the employees to vote against the Union, the Respondent held four series of meetings in the weeks before the election, each one on a different topic conducted by a different member of management. All of the meetings followed the same format with the designated speaker using a power point presentation prepared with assistance of counsel. At each meeting, there was an interpreter to translate the statements made by the management representative from English to Spanish. The meetings were held in a conference room with groups of 15–20 employees. The meetings lasted from 25–40 minutes. According to Brian Glancey, the Respondent's senior director of human resources at the time, the speakers were instructed to read from the power point verbatim, not to deviate from the scripted presentation, and not to allow for questions.[21]

The consolidated complaint in Cases 34–CA–11385 and 34–CA–11417 alleges that statements made by Glancey at his series of meetings unlawfully conveyed to employees that their selection of the Union would be futile. The consolidated complaint further alleges that Macey, the Respondent's operations manager at the time, threatened employees with loss of benefits at his series of meetings. Although Price and Tom Maruri, the Respondent's vice president of operations, conducted the other two series of meetings, there are no allegations in the complaint regarding anything said at these meetings.

a. Macey's alleged threat

Macey conducted the first series of meetings, sometime during the second week of January. The General Counsel relies on the testimony of three witnesses to establish the violation, i.e., Ricardo Rodriguez, Toporovsky, and mixer operator Dave Armstead, a 21-year employee of the Respondent. All three claim that, despite whatever instructions he had, Macey deviated from the power point presentation and spoke extemporaneously during the meeting. Ricardo Rodriguez and Toporovsky attended the same meeting, at approximately 4 or 5 p.m. on January 11. Both recalled that Supervisor Jennifer Rodriguez was at their meeting. Toporovsky recalled the meeting lasting about 40 to 45 minutes. Although Rodriguez testified that the meeting was long and tiring, he did not give a length of time it lasted. Armstead, who works on first shift, attended a different meeting. He recalled that the meeting he attended lasted about an hour.

Ricardo Rodriguez testified that, during the meeting he attended, Macey said, "[I]f you don't want to lose your medical benefits, you will vote 'no'" and "[Y]our 401 (k) will be gone," and "[I]f you don't want to lose your 401(k), you will vote 'no'." According to Rodriguez, Macey did not explain why their benefits would be "gone." Rodriguez conceded that Macey said a lot of other things in the meeting that he could not remember. According to Ricardo Rodriguez, the most significant thing he remembered from the meeting was Macey's use of the command, "you will vote no" after almost every statement he made. On cross-examination, Rodriguez testified that Macey described the Respondent's current health insurance benefits as good and asked the employees why they would want to lose that. Macey went on to say that, with a Union, that might happen and the employees would have to take whatever the Union wanted. Also on cross-examination, Ricardo Rodriguez was asked to review a document purporting to be the power point presentation used by Macey. Although Rodriguez testified that he did not recall seeing all of the pages in the document, he acknowledged that at least part of the proffered exhibit was shown during the meeting.

Toporovsky's recollection of the meeting differed slightly from that of Ricardo Rodriguez. He testified that the theme of Macey's meeting appeared to be to tell people to vote "no" by pointing out the Union's weak spots. He recalled Macey talking about union-represented employees at General Motors losing their jobs and about other unionized employers in the area shutting down. He then testified that Macey said that the Respondent's employees could lose their health insurance and 401(k) because the Union would come in with their own health and pension benefits. He did not recall Macey saying that these benefits would be subject to bargaining. According to Toporovsky, that was said at another meeting. Like Ricardo Rodriguez, Toporovsky distinctly remembered Macey repeat-

[21] Glancey left the Respondent's employ in September. He was not an employee when he testified at the hearing.

edly saying,"vote no." Also, as with Ricardo Rodriguez, Toporovsky did not recognize the document proffered by the Respondent as the complete power point presentation Macey used. He did recall that Macey's statement about losing medical and 401(k) benefits was not on any power point slide but rather was said when Macey elaborated on a statement in one of the slides.

Armstead testified that Macey told the employees at his meeting that their Blue Cross/Blue Shield insurance would be gone if the Union came in because the Union would want the employees to see a union doctor. Armstead recalled that Macey said that everything would be subject to bargaining, that everything would be wiped clean, that the employees would have to start from the beginning, and they could lose. He recalled further that Macey said the employees either could or would lose their 401(k) benefits, although he was not certain about this. Armstead also testified that Macey told employees that with a union, there would be shop stewards and they would no longer be able to go directly to him with a problem. If an employee had a problem, they would have to talk to the steward and, if the shop steward didn't like you, he might not bring the problem to Macey. As did Ricardo Rodriguez and Toporovsky, Armstead clearly recalled Macey repeatedly telling the employees to "vote no." According to Armstead, he spoke up at one point, saying, "[W]e could also vote '[Y]es' to which Macey responded that it was his meeting, don't disrespect him. When Armstead tried again to point out that employees could vote "yes," Macey told him if he disrupted the meeting again, he would be asked to leave. On cross-examination, Armstead conceded that he could not recall everything that Macey said which deviated from what was on the power point slides and admitted that he did not pay close attention to what Macey was saying because he had already made up his mind. However, he reaffirmed his testimony on direct, stating that he had a clear recollection of the statements Macey made regarding the loss of benefits.

Macey, when called as a witness by the Respondent, specifically denied making the statements attributed to him by the General Counsel's witnesses.[22] He testified that he merely read the slides in the power point and made no additional comments. Although some of the power point slides had words and phrases, such as "vote no," printed in bold type, Macey denied emphasizing these statements when he read the slides. He also claimed, somewhat disingenuously, that the purpose of his presentation was not to urge the employees to vote no, despite the appearance of this admonition in the slides. According to Macey, he began the meeting by telling the employees he was there to provide them with information and that he would not be taking questions. He told the employees that, if they had questions, they could ask them at another time. He did corroborate Armstead's testimony regarding Armstead's interruption and his response and recalled that Borukhovich had also interrupted another meeting by making the same statement he made during Price's employee communication meeting about a week earlier. According to Macey, each of his meetings lasted 30 minutes.

The only witness the Respondent called to "corroborate" Macey's denial was Jennifer Rodriguez.[23] Jennifer Rodriguez denied that Ricardo Rodriguez and Toporovsky were at the meeting she attended. She specifically denied that Macey made the alleged threats attributed to him by these witnesses and denied further that he deviated from the scripted power point presentation. However, she admitted that she could not recall whether he read the script "line-by-line." Jennifer Rodriguez also exhibited poor recall regarding other details of the meeting, including who else was at the meeting she attended.

In addition to the testimony of Macey and Jennifer Rodriguez, the Respondent proffered the scripted power point presentation as part of its defense to this unfair labor practice allegation. As to be expected, nothing on the face of the document amounts to an unfair labor practice under current Board law. Instead, the power point slides contain information about the election, urge employees to vote "no," posit the loss of 30,000 jobs at GM as the reason the Union is seeking to represent the Respondent's employees, discusses the role of shop stewards (called "Union pushers") and the "control" they and the Union would exercise over employees work and lives if the Union were successful, refers to unions' history of "embezzlement, theft . . ., etc." and, at the end, asks the employees if they are willing to "risk it." None of the power point slides in evidence mention the potential loss of medical or 401(k) benefits. The only reference to these benefits is on the following slide, which appears toward the end of the presentation:

How does a Union Make its Money

- Through dues, fines and assessments.
- By attempting to control your health insurance premiums.
- By attempting to control your incentives, bonuses, etc. . . . .
- By attempting to control your 401k monies.

Thus, whether the Respondent committed this alleged unfair labor practice turns initially on whether the testimony of the General Counsel's witnesses, that Macey did not limit himself to the scripted presentation, is credible.

Having carefully considered the matter, I am unable to credit Macey's testimony that he merely read the script and did not say anything beyond what was on the slides. I note that Jennifer Rodriguez, whom I have already found not to be a credible witness, did not effectively corroborate this testimony. Although she claimed that Macey did not deviate from the script, she admitted not being able to recall if he read it "line-by-line." Moreover, if Macey had simply read what was on the slides, the meeting could not have lasted the thirty minutes he claims, and certainly not 40 minutes to an hour, as the General Counsel's witnesses recalled. In fact, it takes about 5 minutes to read through the exhibit purporting to be the power point presenta-

[22] These denials were elicited by leading questions from the Respondent's counsel.

[23] Macey testified that Jennifer Rodriguez attended at least one of his meetings in its entirety and that she may have been present for parts of other meetings. In all, Macey held nine meetings, three on each shift, with about 15 employees at each meeting.

tion, if one reads it at a pace one would expect to be used in a meeting of this nature. Even allowing for time for the interpreter to translate what Macey was saying, the process could not have consumed 30 minutes, unless Macey elaborated on the points raised in the presentation.[24] Finally, I note the natural human tendency to extemporize from a prepared script in situations where an individual is speaking on a matter of significance and is trying to make a point, or sell an idea.

Having found that Macey did not limit himself to the script, at least at the two meetings attended by General Counsel's witnesses, I must determine whether he made the statements attributed to him by these witnesses and whether such statements amount to a threat of loss of benefits in violation of the Act. Because I have discredited Macey's claim that he limited his statements at the meeting to what was in the script, I find his denial of the alleged threat unpersuasive. I do not corroborate any of Jennifer Rodriguez' testimony about this meeting. As with her testimony regarding the conversation with Ricardo Rodriguez and her testimony regarding the purported job descriptions, I find that she was simply saying what was expected of her and was not candid in her testimony.[25] At the same time, the testimony of General Counsel's witnesses was not free from doubt. I note, in particular, the lack of context to the statements they recalled from the meeting. Although all recalled the meeting lasting a considerable amount of time, they recalled very little of what was said. In addition, on cross-examination, counsel for Respondent was able to undermine some of their direct testimony by getting the witnesses to acknowledge either that they were not paying attention, or that they had confused several meetings, or that their memory was not clear. At the same time, I am struck by the fact that all three recalled very similar statements by Macey, which they adhered to during somewhat lengthy cross-examination.

After careful consideration, I have decided to credit General Counsel's witnesses and find that, at the two meetings conducted by Macey that they attended, he elaborated on the points raised in the power point by telling employees that, if they selected the Union, they could lose their current health and 401(k) benefits because the Union would want to have their own such benefits. This statement was most likely made in connection with the point made in the slide that unions make their money through such fringe benefit funds and to emphasize the theme of Macey's meeting, i.e., that employees would "lose control" if they were represented by a union. Whether such statements violate the Act turns on whether the message conveyed to employees is that their wages and benefits are threatened, not because of the uncertainties of collective bargaining, but simply because the employees selected a union to be their bargaining representative. *Federated Logistics & Operations,* 340 NLRB 255 (2003), enfd. 400 F.3d 920 (D.C. 2005), and cases cited therein. There is little or no discussion of the give-and-take of collective bargaining in the Respondent's scripted power point presentation.[26] On the contrary, a review of Macey's presentation reveals that the message to be conveyed was that employees' "loss of control" to the Union, and everything that went along with that, would happen upon the Union's selection as the employees' bargaining representative. The potential loss of benefits was a given, if the employees voted for the Union, just as the loss of direct access to management would be once the "Union pushers" became shop stewards. Under these circumstances, Macey's statements at the meetings attended by General Counsel's witnesses amounted to an unlawful threat of loss of benefits, and I so find.

b. Glancey's alleged statement of futility

Glancey conducted the third series of meetings, within a week of the election.[27] At the hearing, the General Counsel offered the testimony of three witnesses, i.e., Toporovsky, Borukhovich, and Jeanelle Samuels,[28] to establish that Glancey made unlawful statements suggesting the futility of union representation. In her brief, counsel for the General Counsel argues that the "totality of the evidence," including the power point presentation itself considered in the context of the testimony of employee witnesses and statements made by management representatives at other meetings, conveyed the message that a vote for the Union would be futile.

Toporovsky and Borukhovich attended the same meeting, on second shift. Samuels, who worked third shift, attended a different meeting.[29] As with the testimony regarding Macey's meeting, these three witnesses recalled that Glancey deviated from the script of the power point presentation, elaborating on the points made on the slides being shown. The witnesses had difficulty identifying the document offered by the Respondent as the power point used by Glancey, recalling some slides but not others. This is understandable because an individual is more likely to remember something they heard at a meeting than what was written on a slide projected on a screen. All three witnesses agree that Glancey identified himself as the man who would represent the Respondent at any negotiations with the Union and that he told the employees he had a lot of experience dealing with unions. Toporovsky recalled Glancey telling the employees he was "very good at it." Each also remembers Glancey saying essentially that employees could lose what they currently had as a result of negotiations. None recalled him saying that employees could gain anything from bargaining. Nor did any of them recall specifically that Glancey "explained" the process of collective bargaining, despite what appears in the purported script of the power point.

[24] Because the Respondent insists that questions were not allowed, the additional time can not be explained by employee participation.

[25] Even if I were to credit Jennifer Rodriguez, her testimony would not be inconsistent with that of General Counsel's witnesses because she insisted she was not at the meeting attended by Ricardo Rodriguez and Toporovsky and, because she did not work on the same shift as Armstead, she was most likely not at that meeting either. In any event, she did not claim to be at the meeting he attended.

[26] The collective-bargaining process was the theme of Glancey's meeting, to be discussed.

[27] Glancey testified that he conducted three meetings per shift, for a total of nine, with between 8 and 13 employees at each meeting.

[28] At the time of her testimony, Samuels had been employed by the Respondent for more than 19 years. She was also an alleged discriminatee in one of the settled cases.

[29] Samuels did not stay for the entire meeting. She left after about 20–30 minutes when Glancey would not let her ask questions.

Samuels, who testified in more detail about her meeting, recalled that Glancey also told employees that the Respondent once had four plants that were unionized and now had two. Glancey did not identify the plants and did not say that they had closed because of the unions. Samuels also recalled that Glancey spoke about the possibility of strikes and their impact on employees, saying that the Respondent would use managers and temporary employees to work if they went on strike and that the employees might not get their jobs back when they returned. Samuels did not remember Glancey using the phrase "economic strike." At one point, Glancey told the employees at the meeting Samuels attended that he had seen strikes last 7 years or longer. Borukhovich also recalled Glancey speaking about strikes although he did not recall as much detail as Samuels. What Borukhovich did recall with certainty is Glancey telling the employees throughout the meeting to "vote no."

Glancey denied, in response to leading questions from counsel, that he made the statements attributed to him by the General Counsel's witnesses that would suggest the futility of bargaining. According to Glancey, he strictly followed the instructions to "stick to the script," making no extemporaneous comments, and to prohibit the employees from asking questions or making comments. Unlike the other speakers, however, he participated in the preparation of the power point presentation he used at the meetings, including deciding which words and phrases to put in bold type. He acknowledged that he probably emphasized the passages in bold when reading the script. Glancey testified that each presentation, with the translation, lasted 25 to 30 minutes.

All parties appear to rely on the power point presentation to prove their point. The Respondent argues that all of the statements contained in the scripted presentation are lawful statements regarding the collective-bargaining process and are protected under Section 8(c) of the Act. The General Counsel and the Charging Party, on the other hand, argue that the "message" contained in the presentation, as evidenced by what Glancey chose to highlight, was that employees would gain nothing from bargaining. The General Counsel emphasizes the following portions of the presentation, with the bold type shown here in the original, as hammering home the message of futility:

What Happens if the Union Wins?
Simply Stated
The Union Wins the **Right to Bargain!**
Nothing More

What Obligation Would the Company Have?
Simply Stated
The Obligation to
Bargain in Good Faith

What Does Bargaining in Good Faith Mean?
Nothing More
Than
To Sit Down With the Union
&
Talk in Good Faith!
It Does Not Have to Agree To Anything
That It Believes Is Not in
Best Interest of the Company

Bargaining Is A Two-Way Street

- **Nothing is Automatic,** No matter What The Union Told You.
- Bargaining Is A "**Give & Take**" Process
- There Is **No Guarantee** That You Will Maintain What You Presently Have.
- You **Could Lose** What You Have Now!
- The Company **Does Not** Have To Agree To Anything!

We Will Not Agree To Anything

If It Is Not In The Best Interest of The Company's Financial Future!

The next slide in the presentation states that the Union does not choose what to negotiate, that **everything** gets negotiated and "you may actually **end up with less!**" The next few slides talk about the Union's desire for a union-security clause and dues checkoff, suggesting what the Union might be willing to trade for these provisions, i.e., wage increases, Blue Cross/Blue Shield coverage, sick days, holidays and vacations. Or, the presentation suggests, the Union might ask the employees to pay more for their benefits as a trade off. The employees are then told that, despite what the Union may have told them, "the company **does not have to give something up** in negotiation **for nothing**. Negotiations **Does Not Work** that way! In negotiations employees could clearly **end up losing!**"

The next section of the presentation deals with impasse, using a proposal on wages to illustrate the topic. In the example, the Union proposes an increase from $12 to $14 per hour while the Employer proposes a decrease to $10 per hour. The slide then states, "once the parties have **negotiated in good** faith and have truly reached impasse . . . the law allows the employer **to implement** its proposal and pay employees the **$10** per hour it proposed!" (Emphasis in original.) The General Counsel relies upon the use of the word "once" rather than "if" as conveying the message that impasse is inevitable. The next slide tells employees there are three possibilities in negotiations, including that they could end up with more or the same as they currently had, "but have to pay union dues, fines and assessments." The section on negotiations ends with the statement that "management **never loses its right** to manage it's people and operation [sic]."

The next section in the presentation deals with strikes. The first slide in this section asks the question: "What can the Union do if the company says no in negotiations?" The answer provided is that the Union has the power to call the employees out on strike. On the next slide, the Respondent reassures employ-

ees that "a strike is not inevitable" and states that the Respondent will do everything it can to avoid one. The presentation then counterbalances the Union's right to strike with the Respondent's right to continue operations and informs the employees that Respondent has already developed a strike plan, which includes, inter alia, operating with temporary and permanent replacements. On the next slide, Respondent answers the question, how long could a strike last, by citing "several years" as one possibility. The presentation then discusses the hiring of permanent replacements and the rights of striking employees. Finally, the employees are told that the Union will continue to earn money during a strike, only the employees will be without income. The power point ends by telling the employees that they can minimize the possibility of "all this happening to you . . . by voting no."

In her brief, counsel for the General Counsel also relies upon statements made by Price during his power point presentation and by Maruri in his final speech to the employees before the election as "illuminating and reinforcing" Glancey's message of futility. Specifically, the General Counsel cites the following slide from Price's presentation, which was the second of the four preelection speeches:

> What Is the Union **Not** Going To Do?
>
> **They Will Not Be Able To Tell** Us How To Run Our Operation!
>
> **They Will Not Be Able To Tell** Us What We Are Going To Pay In Wages & Benefits!
>
> **They Will Not Be Able To Tell** Us What Vacations You Are Going To Have!
>
> **They Will Not Be Able To Tell** Us How Many Sick Days We Can Have!
>
> **They Will Not Be Able To Tell** Us How The Facility Is Going To Be Managed!
>
> We Would **Negotiate In good Faith** but We **Will Not** Agree To Anything That Is Not In The Best Interest Of The Company

She also cites the following passage near the end of Maruri's speech:

> What do you think Subway is going to think if the union is voted in and we are unable to deliver our product to them on time, because of strikes called by the union, or other union disruptions. Then remember that none of Subway's other suppliers (General Mills and Rich Products) who provide them with bread, is faced with the same potential union disruptions.

As noted above, the complaint does not allege that anything said by either Price or Maruri violated the Act. Nevertheless, the General Counsel wants me to consider these portions of their presentations as context to Glancey's statements.

The General Counsel and the Charging Party argue that the power point presentation, in the context of other statements and conduct during the campaign, conveyed the message that the outcome of negotiations was preordained and that employees would gain nothing by selecting the Union as their bargaining representative. I disagree. Nothing in Glancey's scripted power point presentation is like the unlawful statements of futility found in the cases cited by the General Counsel and the Charging Party. In *Smithfield Foods, Inc.,* supra, the president of the company expressly told employees that no matter what the union offered in negotiations, the employees would continue to receive the same wages and benefits as employees at the company's other plants. This statement was reinforced by a video in which the company's human resources manger told employees that the union could not get the employees anything, that the only thing employees can get is what the company is willing to give. As found by the Board, these statements conveyed the message that the employer had complete control over negotiations, which is inconsistent with good faith bargaining. In *Federated Logistics,* supra, the employer made statements that bargaining would start at zero and that the union would have to go on strike and that any strike would be unsuccessful, leading employees to believe that any loss of benefits would not be the result of the give and take of bargaining but would be a punitive response by their employer to the employees' selection of the union as their representative. See also *Flamingo Hilton-Laughlin,* 324 NLRB 72 at 119 (1997), enf. denied in pertinent part 48 F.3d 11661 at 1174 (D.C. Cir. 1998) (The company's new president told employees that he foresaw negotiations as lasting for years.); *Kenworth Trucks of Philadelphia, Inc.,* 229 NLRB 815, 877 (1977) (Company president told employees that no matter how the election turned out, it was his company and he'd run it as he pleased.).

As the Supreme Court said, in *Gissel,* supra:

> An Employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or promise of benefit." He may even make a prediction as to perceived effects he believes unionization will have on his company. In such a case, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control or to convey a management decision already made to close the plant in case of unionization.

395 U.S at 618. Although the Court there was addressing an unlawful threat of plant closure, the same test has been applied to similar campaign statements by employers regarding the possible effects of unionization. See *UARCO, Inc.,* 286 NLRB 55, 58 (1987). Recently, the Board reiterated, in an objections case, that absent threats or promises, an employer may explain the advantages and disadvantages of collective bargaining in order to convince its employees that they would be better off without a union. *Medieval Knights, LLC,* 350 NLRB 194 (2007).[30] See also *Park 'N Fly, Inc.,* 349 NLRB 132, 133 (2007).

Applying the above test to the statements at issue here, I find that Glancey's power point presentation, either considered as a whole, or in any specific part cited, never crossed the line be-

[30] Because the standard for determining whether conduct is objectionable is lower than that for finding a violation of the Act, it follows that if the statement would not be objectionable, it could not be a unfair labor practice.

yond what is protected by Section 8(c) of the Act. While it is true that Glancey emphasized the possible negative outcomes of collective bargaining, at no time did he indicate that these were a preordained conclusion. On the contrary, he stated at several points that whatever resulted from unionization would be the product of "good-faith negotiations" and he expressly stated the Respondent's commitment to bargain in good faith. Moreover, none of the statements attributed to him by the General Counsel's three witnesses, allegedly made when he deviated from the script, amounted to a statement of futility. None of these witnesses recalled Glancey making statements that would indicate that the Respondent would have control over the negotiations, that a strike was inevitable, or that bargaining would start from "scratch" or "zero" or similar comments. Even Samuels' testimony that Glancey said he had seen strikes last "seven years" was not a statement that the Respondent would intentionally prolong negotiations to deny employees the benefits of collective bargaining. Finally, I attach no weight to the statements contained in the presentations given by Price or Maruri that are cited by the General Counsel. As noted, the General Counsel has not alleged these statements are unlawful. That being the case, if Glancey's presentation itself contained no unlawful statements of futility, then I fail to see how a lawful statement by another management representative at a different time could convert his speech to a violation of the Act.

Accordingly, based on the above, I find that the General Counsel has not established that Respondent, through Glancey, made statements that selection of the Union would be futile, as alleged in the complaint, and I shall recommend that this allegation of the complaint be dismissed.

C. The 8(a)(3) Allegations Regarding Lee Mabry

The consolidated complaint in Cases 34–CA–11385 and 34–CA–11417 alleges that Respondent discriminatorily denied Lee Mabry reinstatement following a workers' compensation leave of absence, and discriminatorily devised and applied a workers' compensation program light-duty policy and a machine operator job description in order to deny Mabry reinstatement. The Respondent has denied these allegations and offered testimony and evidence at the hearing purporting to show that the two policies at issue were adopted more than a year before Mabry requested reinstatement. Respondent further offered evidence that the decision not to reinstate him was based upon conflicting reports from doctors who had treated Mabry and the Respondent's good-faith belief that he was not fit to perform the duties of his job. In this connection, the Respondent has asserted that the Board lacks jurisdiction to determine whether Mabry was physically able to return to work, as that issue is properly before the Connecticut Workers' Compensation Commission.

As noted at the beginning of this decision, it is undisputed that Mabry was perhaps the leading union advocate at the Respondent's facility from the beginning of the campaign in 2001. As stipulated by the parties, he was "the face of the Union" in the media and was quoted extensively in newspaper articles, and other media. Mabry's quotations in these media reports often appeared in the context of inflammatory allegations against the Respondent. It is clear from the evidence that this particular campaign has received a great deal of local media coverage, particularly surrounding the first election and the unfair labor practices and objections to that election.[31] Knowledge of Mabry's union activity and support can hardly be denied by the Respondent. The Respondent's animus toward the Union is demonstrated by the unfair labor practices found above as well as those found by Judge Biblowitz and adopted by the Board at 347 NLRB 460. The General Counsel also proffered evidence, to be discussed, of particular animus toward Mabry. The issue to be determined here is whether that animus motivated the Respondent to deny reinstatement to Mabry and if so, whether the Respondent has proved that it would have denied reinstatement to Mabry even if there were no union activity. See *Wright Line,* 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393 (1983).

Mabry had been employed by the Respondent since July 8, 1991. He started as a machine operator and was promoted to mixer operator, the position he was working when he was injured on July 20, 1998, when a partial pallet of sugar fell off a forklift onto his head. He suffered a severe cervical spine and neck injury. After being out of work for about a month, Mabry returned to work operating a labeling machine. This job, located in the office area, involved very little physical exertion. After a week or two performing this light-duty job, Mabry attempted to return to his old job. He was unable to perform the mixer's job because of the amount of lifting required. He returned to his doctor who gave him a note dated August 17, 1998, restricting him to lifting no more than 30 pounds and no overhead lifting. After submitting this note to the Respondent, he was assigned to the machine operator position, working on one of the mixer lines. There was much conflicting testimony about the physical requirements of this job, which I will discuss infra. It is sufficient at this point to note that Mabry was able to perform the machine operator job, with his doctor's restrictions, from August 1998 until September 10, 2001, when he went out of work to have surgery on his cervical spine.

It was while Mabry was recovering from surgery that the union organizing drive began. Although he was out of work, he was active in the campaign and served as one of the Union's observers at the November 29, 2001 election. Mabry returned to work in April 2002, in the same machine operator position he held before his surgery. He continued to work in that position until pain forced him to go out on leave again in February 2003. Mabry was out of work this second time until August 2003. During his absence, Price was hired as plant director of the North Haven facility. When Mabry returned to work this time, he was restricted to lifting no more than 30 pounds with no over the shoulder lifting. Mabry returned to the same machine operator position he held before. Mabry testified that he was able to perform all the duties of this job without significant modification or accommodation. Price testified that he in-

[31] These are the cases that were settled over the objection of the Union. It appears that, following the settlement, and in the period immediately preceding the January 2006 election, the media coverage had significantly diminished.

formed Mabry's supervisors of his medical restrictions and instructed them to make accommodations. None of these supervisors testified at the hearing. Price also testified that he was aware that Mabry was unable to perform all parts of the job because he received complaints from machine operators that they were being required to pick up the slack for Mabry. Price was able to identify only one employee who complained, Lou Criscuolo. The General Counsel called Criscuolo on rebuttal. Criscuolo, who has worked for the Respondent in excess of 16 years, was still employed by the Respondent when he testified. Criscuolo confirmed that he worked on the same line with Mabry in 2003 but he denied ever complaining to Price about having to carry the load for Mabry. In fact, Criscuolo denied that he had to perform Mabry's duties for him.

In October 2003, while still working as a machine operator, Mabry testified in Hartford, Connecticut, at a State legislative hearing regarding the Union's attempts to organize the Respondent's employees and the Respondent's response. Price also attended this hearing along with other management officials from North Haven and the Respondent's corporate offices. There is no dispute that, shortly after this, Mabry and Price had a conversation in Price's office. According to Mabry, Price called him to the office and told him that lies had been told about the Respondent at the hearing and that this was hurting the company. Price told Mabry that changes had been made at the plant and that employees were no longer subject to the abuses Mabry had complained about. Mabry agreed with Price that changes had been made but he told Price that more needed to be done and the employees needed a union. Price and Mabry then debated whether the Union's corporate campaign was having any impact and whether the employees would be hurt by it. At the end of the discussion, according to Mabry, Price said that they were never going to agree on these issues and that he was going to fight Mabry to the end. Mabry responded that he was prepared to fight. Price testified that Mabry came to see him on his own after the legislative hearing. According to Price, Mabry said he wanted to make sure there were no hard feelings. Price admits telling Mabry that some of the things said at the hearing were lies, in particular the accusations that discrimination and mistreatment of employees was continuing. Price testified that the meeting ended with him and Mabry agreeing to disagree. He denied that he told Mabry he would fight him to the end. Price testified that, at some point during this meeting, Mabry said he was only in it for himself, that he wanted more money and if the Union could get him more money, he didn't give a damn about anybody else. I note that such a comment seems inconsistent with Mabry's activities on behalf of the Union and his fellow employees since 2001 and somewhat out of character. This fabrication on Price's part leads me to discredit his version of the conversation.

Not long after this meeting, on November 17, 2003, Mabry was forced to go out on workers' compensation again due to radiating pain and numbness in his arms and fingers. An independent medical examination ordered by the Workers' Compensation Commissioner presiding over his case found that his surgery had not been entirely successful and that two of his vertebrae failed to fuse properly. He had a second cervical spine operation on September 1, 2004. While out of work recovering from the second surgery, Mabry continued his involvement with the Union, walking the picket line with the maintenance employees during their unfair labor practice strike in May and June 2005 and attending the unfair labor practice hearing before Judge Biblowitz in November 2005.[32] After this hearing, Mabry and others distributed a leaflet outside the plant informing employees of the case. The leaflet was headlined: "What is Richard Price afraid of?"[33] On December 2, 2005, Price posted in the plant a memorandum to the employees responding to the Union's leaflet. In this memo, Price referred to Mabry and other union supporters who were at the hearing as "our typical few employees who make it a point to participate in all these events." Around the same time, during the first half of December 2005, Mabry began circulating a petition for employees to sign, addressed to the NLRB and Congresswoman Rosa DeLauro, demanding a Union election "now." Mabry testified that he solicited employees to sign the petition in the Respondent's parking lot and at nearby fast food restaurants frequented by the Respondent's employees. The petition was faxed to the NLRB's Regional Office and to DeLauro on December 22, 2005, the day after Mabry first attempted to return to work.

On December 21, 2005, Mabry went to the Respondent's facility with a note from Dr. Frank Lee of the Connecticut Spine and Pain Center, who had been providing pain management treatment to Mabry following his surgery in 2004. Dr. Lee's note, dated December 20, 2005, listed Mabry's "present restrictions" as: "no restrictive neck movement. Avoid pushing and pulling. No lifting for more than 10 lbs." Mabry found Price in the conference room with several managers. According to Mabry, Price and Personnel Manager Maria Giaimo came out of the room into the hallway where Mabry was standing. Mabry handed Price an envelope containing Dr. Lee's note saying, "[T]his is my return to work." Price opened the envelope, read Dr. Lee's note and said, "[W]e don't have anything for you in light duty." Price told Mabry he would get a letter notifying him of this fact. Price then escorted Mabry out of the building. The next day, Mabry received a letter from Price, dated December 21, 2005, which referenced Dr. Lee's restrictions and then cited an Independent Medical Evaluation (IME) dated October 24, 2005,[34] as containing the following restrictions:

1. Capable of light duty work.
2. No repetitive use of the neck.
3. No repetitive lifting.
4. No working overhead.
5. No lifting over 20 pounds.

In the letter, Price then stated that the IME report indicated that "maximum medical improvement may have been reached depending on the results of a bone SPEC scan." Price ends his letter by reminding Mabry of their conversation earlier that day in which he told Mabry that the Respondent did "not have any

[32] Mabry did not testify in that proceeding.

[33] The headline apparently referred to Price's failure to appear and testify at the unfair labor practice hearing.

[34] This IME was performed by Dr. William Druckemiller at the request of the Respondent's compensation carrier.

positions that can accommodate these restrictions. Please advise us if your work restrictions are modified in the future."

Mabry testified that, after receiving Price's letter, he went back to see Dr. Lee because he wanted Lee to release him to work without restrictions. According to Mabry, he told Dr. Lee that he had done the job before and knew he could do it. He asked Dr. Lee to release him from the restrictions in his note. Dr. Lee told Mabry that he was waiting for a job description from the Respondent. When Mabry contacted Dr. Lee a few days later, he said he had received the job description and appeared reluctant to talk about it. Dr. Lee let Mabry see the job description that had been faxed to him by the Respondent, but he refused to give Mabry a copy. On December 27, 2005, Mabry attended a hearing before the worker's compensation commissioner over the suspension of his benefits. As a result of this hearing, Mabry went back to see the surgeon who performed the September 2004 operation, Dr. Alan Waitze. Dr. Waitze ordered a "functional capacity evaluation" to determine what kinds of work activity he could perform. This evaluation was done on January 4, 2006.[35] Dr. Waitze also referred Mabry to a new doctor for pain management, Dr. Kloth, because Mabry no longer had confidence in Dr. Lee.

On April 4, Dr. Kloth gave Mabry a release to return to work on April 10 with no restrictions. On April 10, Mabry went to the Respondent's facility with this release. He met with Price and Giaimo in the office area of the plant. According to Mabry, Price told him that the matter needed to be evaluated and that Mabry would be notified of the results of the evaluation. Nothing more was said and Mabry left the facility. A few days later, Mabry received a letter from Giaimo requesting that he sign a release so that the Respondent could obtain his medical records and talk to his four most recent physicians. In her letter, Giaimo explained that the Respondent was unfamiliar with Dr. Kloth, that it appeared he had not treated Mabry before, and his release without restrictions was different from reports of other doctors who had imposed restrictions on Mabry's work activities. Giaimo expressed concern for Mabry's well-being and a reluctance to return him to work where he might re-injure himself. She informed Mabry that after conferring with his doctors and evaluating the situation, the Respondent would determine whether he could return to work.[36] On May 18, after communicating with his workers' compensation attorney and the attorney communicating with the Respondent's labor counsel, Mabry signed the release, as modified by his attorney.

Mabry heard nothing further from the Respondent regarding his request to return to work until October 14, shortly before the hearing in this case opened. On that date, he received a Federal Express package containing a letter from Macey, who had succeeded Price as plant director in July. Macey informed Mabry that Dr. Kloth had submitted an accommodation assessment form at the Respondent's request which indicated that Mabry could not lift more than 20 pounds and could not push or pull more than 50 pounds.[37] Macey stated in the letter that the Respondent did not have any positions that could accommodate these restrictions. Macey went on to state that, based on his interpretation of the medical reports from Dr. Druckemiller and Dr. Waitze in 2005 as indicating Mabry was at "maximum medical improvement" with a "permanent partial disability," he was not eligible for the Respondent's light-duty program. Macey did not explain or elaborate regarding the decision-making process after he took over from Price in July 2006. He merely testified that he based his decision not to return Mabry to work on Dr. Kloth's responses on the assessment form and the Respondent's light-duty policy.

Price testified regarding his response to Mabry's December 21, 2005 request to return to work. According to Price, when he and Giaimo met with Mabry, he asked who was Dr. Lee because he was not familiar with him as one of Mabry's doctors. Price claims he also asked Mabry if he had explained to Dr. Lee the demands of his job and Mabry responded that he had. Price testified he then asked Mabry if it was okay for Price to speak to Dr. Lee to clarify the restrictions in his note and, again, Mabry responded affirmatively. Price claims he wrote the December 21 letter to Mabry after this meeting and before speaking to Dr. Lee because he thought there were discrepancies in Dr. Lee's note. On cross-examination, Price claimed that, after Mabry left the facility, he asked Giaimo to retrieve Mabry's compensation file. It was while reviewing the file that he came across Dr. Druckemiller's IME with the apparently inconsistent work restrictions. As previously noted, Giaimo did not testify to corroborate Price's version of events. In addition, in the December 21 letter, Price confirmed that he told Mabry there was no work for him before undertaking any investigation, including the review of Mabry's file. I also note, as pointed out by counsel for the General Counsel and the Charging Party, that Price's manner of answering questions about his response to Mabry's request, by using the plural "we" and the conditional tense, "would have" did not instill confidence that his answers were a truthful recounting of events. It appeared more along the lines of a studied attempt to conceal what really happened. It is also noteworthy that Price consulted with the Respondent's corporate offices and labor counsel in response to Mabry's request. This was a departure from the way in which a return to work by employees on worker's compensation is customarily handled. According to Price, such matters are usually handled by the human resources department in consultation with the Respondent's compensation insurer.

Price admitted contacting Dr. Lee after Mabry submitted his release to return to work, which is also not his customary response to a request to return to work. According to Price, he asked Dr. Lee if Mabry had disclosed to him the physical demands of his job. When Dr. Lee said he had not, Price faxed a copy of the machine operator job description to him. This is the job description that the General Counsel alleges was concocted

[35] The functional capacity evaluation showed that Mabry was capable, inter alia, of lifting 50 pounds frequently and occasionally more than 50 pounds. He was described as functioning within the heavy physical demand level. There is no evidence that the Respondent ever saw this report.

[36] Giaimo did not testify at the hearing.

[37] As the General Counsel points out in her brief, Macey's characterization of Dr. Kloth's restrictions was not completely accurate. Dr. Kloth wrote on the assessment form that Mabry's capacity for pushing and pulling would be increased "if on wheels."

to deprive Mabry of reinstatement. Price testified further that at the time Mabry made his request to return to work, the Respondent was operating under a workers compensation light-duty policy that had been adopted in 2004. Under this program, light duty is only temporary, limited to 60 days, and not available to employees who have a permanent disability preventing them from returning to full duty. Price testified that he interpreted the reports in Mabry's file as indicating his restrictions were permanent. The General Counsel has also alleged that this light-duty program was discriminatorily adopted and applied to Mabry to deny his return to work.

Price testified that he created the light-duty policy, which he relied on as a basis for denying reinstatement to Mabry, in early 2004. According to Price, there was no policy in place when he arrived at the plant. At that time, the Respondent's practice was to reinstate anyone who returned to work with a doctor's note after an injury, whether or not the injury was work related, without limit to how long the employee could remain in a light-duty assignment. Price testified that this created problems for other employees who had to pick up the slack for the injured employee. Price plagiarized the new policy from one that had been in place at Pillsbury, one of his previous employers. The new policy, which purports to have an effective date of February 2004, provides in pertinent part:

> Chef Solutions in North Haven, Connecticut recognizes the value of permitting employees returning from illness or injury to temporarily work on a light duty basis. Light duty placement may include a reduction of work hours, limiting or altering duties in the employee's existing position, or temporarily reassigning the employee to another position, which he or she is qualified and capable to perform under a qualified physician's restrictions.
>
> Under this policy, "temporary" has been defined as not to exceed more than sixty (60) days for non-recurring illness and/or injury. This "light duty" policy does not recognize "permanent" light duty work, but will make accommodations under the ADA.
>
> In cases where an employee has had an on-the-job injury/illness, the employee's supervisor in conjunction with the Human Resource department shall fully consider and attempt a light duty placement of the injured/ill employee for no more than sixty (60) days. If within sixty (60) days after their return to work on light duty the injured/ill employee is unable to perform the full scope of the duties of their regular full-time position because of ongoing medical restrictions, the individual will be released from light duty and placed on full-time workers compensation. These individuals will not be allowed to return to work to full-duty until they are fully released without restrictions by a qualified medical provider.

The policy also treats nonwork-related injuries differently.

Price testified further that this new policy "would have been communicated" to employees at an employee communication meeting and "would have been posted" on a bulletin board immediately after the meeting. Such postings usually remain on the board for about a week. After that, the policy would be kept in the human resources department with all the other company personnel policies. According to Price, he "probably would have communicated" this at a meeting in late January 2004, shortly before the policy was to go into effect. Price didn't believe copies of the policy were distributed to the employees. The only witness to corroborate Price regarding the dissemination of the light-duty policy was Supervisor Jennifer Rodriguez. She testified that she attended a meeting at which Price presented the policy to the employees. She also claimed to have seen it posted on the bulletin board. She could not recall any details of this meeting beyond her "corroboration" of Price's testimony about the policy. Jennifer Rodriguez also admitted that she did not keep a copy of the policy in her office, even though under the policy she would have had a role in placing employees in a light-duty assignment. She also admitted that she had not seen the policy since it was allegedly adopted in early 2004 until she testified at the hearing. Significantly, neither Giaimo, the local human resources manager whom Price claimed was involved in the adoption and maintenance of the policy, nor Glancey, who was the corporate human resources official with whom Price would have consulted before adopting such a policy, testified about this policy. None of the employee witnesses who testified for the General Counsel had ever seen this policy.[38]

Price conceded that, after allegedly adopting the light-duty policy in early 2004, he had not reviewed it or otherwise taken any steps to ensure it was being followed until Mabry's return to work became an issue in December 2005. According to Price, the human resources department normally handles these matters. Records from employees' personnel files that the General Counsel obtained by subpoena and placed in evidence show that the 60-day limit had not been strictly followed since the policy allegedly went into effect. The General Counsel in her brief cites 12 employees who remained in light-duty assignments in excess of 60 days, including several who had multiple light-duty assignments during this period. Significantly, the Respondent called no one from the human resources department to testify about the policy or its application to Mabry and other employees.

Having considered the evidence in the record regarding the "light-duty policy," I conclude in agreement with the General Counsel and the Charging Party that there is no credible evidence to establish that this policy was in fact adopted in 2004 and applied at any time before Mabry sought to return to work. In particular, I draw an adverse inference from the Respondent's failure to call Giaimo to testify about this matter, which was admittedly within her jurisdiction, and the failure to ask any questions of Glancey, the corporate human resources official who would be in a position to corroborate the existence of such a policy. I also note the total lack of any objective evidence that would corroborate Price's testimony regarding the adoption and implementation of this policy. See *Daikichi Sushi,*

[38] Respondent argues that there would have been no reason for these employees to be aware of the policy since none of them had suffered a work-related injury after the policy was adopted. However, Respondent's own witnesses claim that *all* employees were made aware of the policy through the meeting and posting. Under these circumstances, it is significant that no employee ever heard of it.

325 NLRB at 622, and cases cited there. Finally, the frequent exceptions to the 60-day limit on light-duty assignments documented in the Respondent's own business records shows either that no such policy existed or that it was not routinely enforced. Either way, it is clear that Mabry's request to return to work was treated differently than that of other employees.

Price also relied upon a job description for the machine operator position that Mabry previously held as a basis to deny him reinstatement. As noted above, he faxed this job description to Dr. Lee in an attempt to show that Mabry could not perform the duties of this job under Dr. Lee's restrictions. As with the light-duty policy, Price claimed that he created this job description with others in late 2003–early 2004. The impetus for this action was a wage increase that Price sought to give the employees. In order to justify a change in the wage scale, Price had to create job descriptions justifying more money by showing differentiation in job skills and greater accountability. Price testified that he completed this task in time for the 2005 wage increase, which was implemented at the beginning of that year.

Price testified that the job descriptions which existed when he came to the plant were very general and contained no ergonomic details, such as lifting requirements. He began the task of redefining the jobs at the North Haven plant by soliciting other plants within the Company to send him their job descriptions. Price identified an October 2004 e-mail he received from the engineering manager at a facility in Thorofare, New Jersey, as being part of this process. Although Price claimed to have gotten information from other plants that he used in compiling the job descriptions, he did not save any of this information. Nor was the Respondent able to produce the more general job descriptions that Price claimed existed when he arrived at the North Haven facility.

Price testified further that, as part of the process, he monitored the jobs in the plant with Macey, "probably" also reviewed equipment manuals, and consulted with supervisors on the job, like Jennifer Rodriguez.[39] He then used a template he got from the Respondent's corporate office and drafted a number of job descriptions, including the one for the machine operator position that he identified. Although Price claimed that he did not need corporate approval to change the job descriptions, he needed these job descriptions to obtain approval for the changes in the wage scale that he wanted to implement. Consequently, Price had to make a report to Glancey and Janie Mirkin, another official in the corporate human resources department to explain the justification for the new wage scale. Although Price claims he used a handout in making this report, he testified that he did not include the new job descriptions in the handout. He merely described, orally, the differences in the jobs that warranted different pay.[40] When Price obtained approval for the wage adjustments, he met with the employees to communicate the news to them. Price "didn't think" he disseminated the new job descriptions to the employees at the same time. According to Price, when the job descriptions were done, he merely gave them to the human resources department where they were maintained. No other witnesses were called to testify regarding the maintenance and application of these job descriptions. In addition, none of the employee witnesses had seen the particular job description at issue before. Rodriguez herself testified that she was never given a copy of any of the new job descriptions, despite here position as a supervisor. Even Macey, the operations manager at the time Price allegedly redefined the job descriptions, testified that he did not see the job description until the summer of 2005.

The machine operator job description that Respondent relies upon includes, in the "general description" section, the following requirements:

> The position requires a minimum weight lifting of 50 pounds. Pushing and pulling of 250 pound racks and/or flour receptacles. There is continuous movement, i.e. bending, twisting, climbing and lifting.

This format differs from that of other job descriptions that were created at the same time. Unlike the machine operator position, the specific requirements of the job are not listed in the "general description" section. In addition, the other job descriptions do not contain the same degree of specificity as to physical requirements. For example, although the Respondent's witnesses described the heavy physical demands of the scaler position, the job description for that position in evidence is devoid of these physical aspects of the job. Similarly, although Macey testified that the packer has to lift scrap buckets, its job description contains no weight requirement. The testimony of Macey and Price suggests that the mixer position is physically taxing, with frequent heavy lifting, bending and climbing, yet these physical aspects of the job are not in the job description.

Most significant with respect to the credibility of Price's testimony regarding the disputed job description is the evidence from Respondent's own records showing that, not long before Mabry's request to return to work, the Respondent faxed a different machine operator job description to the Respondent's workers' compensation insurance carrier in a case involving a different employee. On November 9, 2005, Zelina Rosa, who was identified as a human resources assistant working in Giaimo's office with responsibility for handling communications with the carrier, faxed a job description which contained none of the weight requirements and repetitive movement requirements that appear in the job description that Price faxed to Dr. Lee and that the Respondent relies upon in this case. In addition, in August 2005, Rosa faxed a completed "Job Requirement" form to the insurance carrier itemizing the job duties of machine operator Juan Serrano. The information Rosa provided on this form is inconsistent with the machine operator job description that Price claims he created in 2004. In the form faxed by Rosa, the machine operator position requires occasional lifting of 11–25 pounds and occasional pushing and pulling, squatting, climbing, and reaching above the shoulder with no carrying and simple grasping.

As previously noted, Respondent offered the testimony of Price and Macey to describe the physical requirements of the job that Mabry held before his injury. In almost every respect, they contradicted the testimony of Mabry and David Armstead, the mixer who is familiar with the job because of the close

[39] Neither Macey nor Jennifer Rodriguez corroborated this testimony.

[40] Glancey was not asked any questions about this process.

proximity of his work location at the head of the production line. In addition, the machine operator and mixer frequently work together to ensure the line is running smoothly. As between the Respondent's witnesses and General Counsel's witnesses, I found Armstead's and Mabry's description of the job more realistic and credible. Their description is also consistent with the company documents cited above that the Respondent's human resources department used in its dealings with the compensation carrier, which is the most objective evidence regarding the requirements of the machine operator position.

As described by Armstead and Mabry, the machine operator job essentially involves cleaning and maintaining the machine which takes the dough mixed by the mixer operator and forms it into rolls to be frozen and shipped to the Respondent's customers. The work involves lifting buckets of scrap which, when properly filled, weigh less than 35 pounds, and pushing a wheeled rack of scrap buckets to the mixer to rework the scrap into a batch of dough. The machine operator is also required to regularly clean out trays of excess flour or dough; adjust, clean, and change the plates that form the dough balls into cylinders; and periodically clean other parts of the machine. The machine operator is also required to fill a wheeled barrel with flour from the flour silo. Although obviously some lifting is required, it is nowhere near the *minimum* of 50 pounds that Price described in the job description he faxed to Dr. Lee. Price's attempt to explain his use of the phrase, "minimum weight lifting of 50 pounds" defied belief and came down to the rare occasion when a machine operator might have to lift 50 pound bags of flour to help the mixer operator, who has the ultimate responsibility for adding flour to the mix. This patent exaggeration was evident throughout Price's testimony and was continued during Macey's testimony.

As the General Counsel argues, the testimony of the Respondent's witnesses was tailored to rely upon the exceptions to the normal routine of a machine operator to make it appear that the physical demands of the job were beyond Mabry's capabilities. Perhaps most telling was the testimony of Rene Caporal, Gustavo's brother who has worked at the North Haven plant for about 15 years. He has been a machine operator for the last 3–4 years, performing the job at issue in this proceeding. Significantly, Caporal suffered a major injury on the job in 1999 in which his right hand was severed. Although doctors were able to re-attach his hand, he continues to have only 60–70 percent use of his dominant right hand. Nevertheless, he is able to do the very job the Respondent denied Mabry, albeit with some help from his coworkers. I found Rene Caporal's description of the duties of the job far more credible than anything said by Price or Macey. I conclude based on the credible and objective evidence in the record that Respondent fabricated a new job description with enhanced physical requirements, which did not reflect the true demands of the job, in order to prevent Mabry from returning to work.

The above recitation of facts shows that, in at least two respects, the Respondent treated Mabry's request to return to work differently than that of other employees. Specifically, the Respondent applied the previously ignored 60-day limit on light-duty assignments and fabricated a more physically demanding job description to deny him reinstatement. The General Counsel offered other examples, culled from the Respondent's business records, showing other employees with work-related injuries were reinstated upon a medical release notwithstanding restrictions that were similar to or greater than those prescribed by Mabry's doctors.[41] These records show that even employees with a "permanent partial disability rating" or who had reached "maximum medical improvement," factors cited by the Respondent's witnesses as fatal to Mabry's efforts to return to work, were permitted to return either to a light-duty assignment or to their previous jobs with accommodations.[42] In addition to the documentary evidence, testimony from several of General Counsel's witnesses revealed evidence of disparate treatment. For example, Ricardo Rodriguez testified that Moses Robertson, an employee from the packing department, worked with him in the quality control department after an injury on the job in December 2005, around the same time that Mabry sought to return to work. Ricardo Rodriguez testified without contradiction that his supervisor, Jennifer Rodriguez, told him that Robertson was to work "light duty," just doing paperwork in the office. Robertson continued to perform light duty for a couple months.

Under the Board's *Wright Line* test, applicable to 8(a)(3) allegations like the one at issue here, the General Counsel must first show by a preponderance of the evidence that protected activity was a motivating factor in the Respondent's decision to deny Mabry's request to return to work. If the General Counsel meets this burden, then the Respondent must show it would have made the same decision even in the absence of protected activity. 251 NLRB at 1089. Accord: *United Rentals, Inc.,* 350 NLRB 951 (2007). The Board has said that it is not enough for the Respondent simply to present a legitimate reason for its action. Rather, the Respondent must persuade, by a preponderance of the evidence, that it in fact acted upon that reason. *Wright Line,* supra. As noted at the beginning of this section of the decision, the elements of the General Counsel's prima facie case are amply supported by the record here. Mabry's role in the Union's campaign is undisputed, knowledge of his activity is admitted, and general antiunion animus has been demonstrated here and in the prior case by unfair labor practice findings. I also note there is credible evidence of particularized animus toward Mabry in Price's statement to Mabry in October 2003 that he would find him to the end over the Union. Finally, the evidence described above showing that Mabry's request to return to work was treated differently than that of other employees is sufficient to persuade me that Mabry's union activities were a motivating factor in the Respondent's decision to deny him reinstatement.[43]

Having already discredited the testimony of Price regarding the light-duty policy and machine operator job description, it is

[41] See, e.g., the workers' comp. records of machine operators Victoria Palma, Juan Sanchez, Hugo Xoxoyotl, Julian Serrano, and Cristano Rodriguez.

[42] See, e.g., the workers' comp. records of Juan Sanchez and the testimony of Rene Caporal.

[43] In fact, as the Charging Party points out, there is no evidence in the record that the Respondent has ever denied an employee's request to return to work upon being released to return by his doctor, regardless of the restrictions.

apparent that Respondent's asserted reasons for denying Mabry's request were a pretext. As noted, there was no consistently applied light duty policy that would have prevented Mabry's return to work and the job description was doctored to exaggerate the physical demands of the machine operator position to make it impossible for any doctor to release Mabry to this job. The Respondent argues that it had no choice but to deny Mabry's request in December 2005 and again in April because of the conflicting evidence from Mabry's doctors. While this argument at first blush has some appeal, it is clear that it is not the true reason the Respondent refused to return Mabry to work. Thus Price told Mabry he had no work for him on December 21 before he even reviewed Mabry's compensation file and before even being aware that there were conflicting reports. Moreover, Price told Mabry there was no light-duty work even though at the same time the Respondent had provided another employee, Moses Robertson, with light duty. Even assuming the Respondent had some legitimate concern about Mabry's ability to perform the machine operator job, this concern should have been resolved by the time the Respondent received Dr. Waitze's report in October, showing that Mabry was capable of performing the job as it had been described in the job description and job requirement form utilized by the Respondent's human resources department.

Having found that the Respondent's asserted reason is a pretext and was not actually relied upon to deny Mabry's request to return to work, it follows that the Respondent has not met its burden of persuasion under *Wright Line,* supra. *United Rentals, Inc.,* supra, and cases cited there. Accordingly, I find that Respondent's refusal to allow Mabry to return to work, since December 21, 2005, violated Section 8(a)(3) and (1) of the Act. In addition, I find that the Respondent's reliance upon a light-duty policy that either did not exist or was routinely ignored and its fabrication of a false job description to prevent Mabry's return to work independently violated Section 8(a)(3) and (1) of the Act because they were a pretext for discrimination.

Finally, I reject the Respondent's argument that the Board lacks jurisdiction to decide this issue because of a state statute that provides that the Connecticut Workers' Compensation Commissioner has the authority to determine an employee's work capabilities. Whatever authority is conferred by the State statute would not deprive the Board of carrying out its function of determining whether this Employer had discriminated against an employee in violation of the Act. The Connecticut Workers' Compensation statute and the National Labor Relations Act address different issues which are not in conflict. Nothing in this decision would interfere with the Commissioner determining in a proceeding before it whether Mabry is entitled to compensation for a work-related injury.[44]

III. PETITIONER'S OBJECTIONS TO THE ELECTION

At the re-run election in Case 34–RC–1925 that was held on January 20, the Union lost by a vote of 84–54 with 1 nondeterminative challenged ballot. On January 26, the Union timely filed Objections to Conduct Affecting the Results of the Election. On May 22, the Acting Regional Director issued a Report on Objections in which he directed that Petitioner's Objections 1, 2, 3, 4, 6, 8, 13, 14, 15, and 16, and the additional unalleged objectionable conduct alleged in paragraph 11 of the consolidated complaint in Cases 34–CA–11385 and 34–CA–11417, be consolidated for hearing with that complaint. The Board, in an unpublished Order dated August 23, after considering the Employer's exceptions to the Report, affirmed the Acting Regional Director's determination to send these objections to hearing. Based upon the Board's Order, the following objections are thus before me for determination:[45]

1. The Employer discriminated against Lee Mabry, a well-known, open, leading Union supporter, for the purpose of discouraging employees from supporting the Union, by refusing to permit him to return to work.
2. The Employer issued a letter to employees, telling them that "we insist" that the employees vote against the Union.
3. The Employer threatened employees with the loss of benefits if the Union won the election.
4. The Employer interrogated employees about their Union activities and sympathies.
5. [withdrawn].
6. The Employer threatened to close the plant if the Union won the election.
7. [withdrawn].
8. The Employer threatened employees with termination if they supported the Union.
9. [withdrawn].
10. [withdrawn].
11. [withdrawn].
12. [withdrawn].
13. The Employer prohibited employees who supported the Union from distributing Union literature on Company premises.
14. The Employer threatened to deny employees raises if they selected the Union as their collective bargaining representative.
15. The Employer issued warnings to employees because of their Union activity.
16. The Employer failed to reinstate unfair labor practice strikers to their former positions of employment.

I have already found above that Respondent, through Jennifer Rodriguez, interrogated employee Ricardo Rodriguez regarding his union activities and support on two occasions be-

[44] The Respondent has not proffered, nor relied upon, any finding or decision of the Workers' Compensation Commissioner that would establish that Mabry was incapable of performing either his machine operator position or any light-duty position the Respondent had.

[45] At the beginning of the hearing, I ruled that the critical period for considering objections in this case, consistent with existing Board law, runs from the date of the last election, November 29, 2001, to the date of the re-run election, January 20. See *Double D Construction,* 339 NLRB 303 (2003); *Star Kist Caribe,* 325 NLRB 304 (1998); *Times Wire & Cable Co.,* 280 NLRB 19, 20 (1986); and *Singer Co.,* 161 NLRB 956 (1966). The Respondent had sought to limit the critical period to the time between the agreement to schedule a re-run election, in December 2005 and the election date.

tween January 10 and the date of the election, and threatened him with plant closure on January 10. Based on these findings, I shall recommend that Objections 4 and 6 be sustained. I have also found above that Respondent, through Macey, threatened employees with loss of benefits during at least two meetings he conducted in the second week of January. Based on this finding, I shall recommend that Objection 3 be sustained. I shall further recommend that Objection 1 be sustained based on my finding that the Respondent discriminated against Mabry by denying him permission to return to work since December 21, 2005. Having found that Price did not threaten Borukhovich with termination at the employee communication meeting in early January, I shall recommend that Objection 8 be overruled. Based on my recommendation that paragraph 11 of the complaint, alleging that Glancey made unlawful statements of futility during his meeting, be dismissed, I shall recommend that this unalleged objection be overruled.

Objections 15 and 16, as determined by the Acting Regional Director, are identical to conduct already found unlawful by the Board at 347 NLRB 460. Those allegations relate to the Respondent's treatment of maintenance department employees Toporovsky and Borukhovich in late May and early June 2005, more than 7 months before the election. While somewhat remote in time, these unfair labor practices had not been remedied when employees voted on January 20. Indeed, Administrative Law Judge Biblowitz' decision finding the unfair labor practices, had just issued on January 19. Under these circumstances, I shall recommend that Objections 15 and 16 be sustained.

Objections 13 and 14, as determined by the Acting Regional Director, are identical to allegations contained in the consolidated complaint that issued in Cases 34–CA–10981 and 34–CA–11029 on January 5, 2005, more than a year before the election. This is the complaint that was resolved by a formal settlement agreement with a nonadmissions clause on March 17, 2005. Because the settlement agreement is not proof of the conduct alleged, the Charging Party offered evidence to prove these objections here. I find it unnecessary to determine whether the conduct occurred as alleged in the objections because these events are too remote in time to have affected the results of the January 20 election. The evidence offered in support of Objection 13 indicates that the alleged prohibition of employees' distribution of union literature on company premises occurred on September 28, 2004. The evidence offered in support of Objection 14 was a notice posted on November 10, 2004, announcing that "all nonunion employees in good standing" would receive a raise effective January 2, 2005. Conduct occurring more than a year before the election could not have affected the results. Accordingly I shall recommend that Objections 13 and 14 be overruled.

The sole remaining objection (Objection 2) relates to a letter in Spanish that was sent to all Spanish-speaking employees on January 6, 2 weeks before the election. There is no dispute that this letter, signed by Plant Director Price, was sent to at least half the employees in the unit whose primary language is Spanish. The following sentence appears in the letter:

> La ley dice ques usted tiene el derecho de no apoyar la union y nosotros *insistimos* a usted que no lo hago.

(Emphasis added.) The English version of this letter, sent to employees at the same time, translates this sentence as follows:

> The law says that you have the right not to support the union and we urge you not to.

The Charging Party called Dr. Lillian Uribe, professor of Spanish and chairman of the Modern Languages Department at Central Connecticut State University, as an expert witness. Dr. Uribe is also a native of Uruguay and Spanish is her primary language. Dr. Uribe testified that "insistimos" literally means "we insist" and that this is an emphatic statement in Spanish. Dr. Uribe testified that there is no literal translation for the word "urge" that appears in the English version of the letter. While acknowledging that "insistimos" could be used as a translation for this phrase, she testified that there are other phrases in Spanish that carry a less forceful tone. Dr. Uribe testified that, were she to translate "we urge," she would use the verb "pedir", i.e., to ask, with an adverb to make it stronger.

The Board applies an objective standard to determine whether conduct warrants setting aside an election. It is not necessary to show that the conduct was intentional or actually had an affect on the election. The inquiry is whether the conduct has a tendency to interfere with employees' free choice. *Lake Mary Health & Rehabilitation,* 345 NLRB 544, 545 (2005), and cases cited there. As with alleged violations of Section 8(a)(1), the Board considers such statements from the point of view of the employee and how an objective employee receiving this letter would understand the statement. See *NLRB v. Gissel Packing Co.,* 395 U.S. at 442.

I find that the Spanish version of the letter, with its use of language that conveys the message that the Employer is insisting that employees not support the Union, is objectionable. The Board has held that "an instruction, admonition, or warning to an employee, express or implied, not to get involved in activities protected by the Act interferes with, restrains, and coerces employees in the exercise of their rights under the Act." *Management Consulting, Inc. (MANCON),* 349 NLRB 249, 249 (2007), and cases cited there. If such statements would be found unlawful under Section 8(a)(1), as was the case there, then a fortiori they meet the test for objectionable conduct. *Dal-Tex Optical Co.,* 137 NLRB 1782, 1786 (1962). Accord: *IRIS U.S.A., Inc.,* 336 NLRB 1013 (2001). Accordingly, I shall sustain Petitioner's Objection 2.

Having sustained those objections which parallel the unfair labor practice findings here and in the prior Board decision, it necessarily follows that the election should be set aside. *NYES Corp.,* 343 NLRB 791 fn. 2 (2004); *IRIS U.S.A., Inc.,* supra; *Dal-Tex Optical Co.,* supra. Although several of the unfair labor practice affected only one or a small group of employees, the threat by Macey was made at two employee meetings attended by at least 30 unit employees. In addition, the letter containing the objectionable statement insisting that employees not support the Union was sent to at least half the unit who spoke Spanish. I find that this objection alone would suffice to warrant a new election. Accordingly, I shall recommend that the January 20, 2006 election be set aside and a new election

conducted after the Respondent has remedied the unfair labor practices found here.

CONCLUSIONS OF LAW

1. By interrogating employees about their union activities, and by threatening employees with plant closure and the loss of benefits if they selected the Union as their collective-bargaining representative, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By denying, since December 10, 2005, Lee Mabry's request to return to work following a workers' compensation leave of absence, and by relying upon a light-duty policy that did not exist or was unenforced and a job description that was exaggerated to deny him reinstatement, the Respondent has discriminated against its employees with regard to their terms and conditions of employment based upon their union membership and activities and has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

3. Respondent has not engaged in any other unfair labor practice as alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent having discriminatorily denied Mabry's return to work since December 10, 2005, it must offer him reinstatement to his job as a machine operator or to a light-duty assignment consistent with any medical restrictions imposed by a physician, and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Because I have found that the Respondent discriminatorily modified the machine operator job description to prevent Mabry's return to work, it should be ordered to rescind the job description that was faxed to Dr. Lee as described above. With respect to the light-duty policy that I have found did not exist or was not applied, Respondent should rescind the policy until such time as it has remedied the discriminatory refusal to reinstate Mabry.

In addition to the traditional remedies for the 8(a)(1) and (3) violations found here, the General Counsel has requested additional remedies to cure the effects of the Respondent's unlawful conduct. Specifically, the General Counsel seeks an order requiring that the Respondent:

1. Direct its Plant Manager, Production Manager, or Corporate Vice President for Human Resources to read the notice to employees during working time, with an interpreter, if necessary, and with a Board agent present during the reading.
2. Supply the Union with unit employees' names and addresses, updated every six months.
3. Allow the Union reasonable access to bulletin boards and to all places where notices to employees are customarily posted.
4. Provide the Union with notice of, and equal time and facilities for the Union to respond to, any employer address to employees about union representation.

The General Counsel further requests that provisions (2), (3), and (4) remain in effect for 2 years from the date of notice posting, or until the Union is certified as the employees' bargaining representative following a free and fair election, whichever occurs first.

In support of this request, the General Counsel cites the Respondent's history of unfair labor practices, as evidenced by the Board's decision in *Pennant Foods Co.,* 347 NLRB 460, supra, and the serious nature of the unfair labor practices found here. The General Counsel argues further that special remedies are necessary here because the Respondent has committed these unfair labor practices after previously having entered into two settlement agreements, including one formal settlement agreement that provided for special remedies similar to those requested here. Although I previously rejected the settlement agreements as evidence when proffered at the hearing, I have considered them as part of the history of the case.[46] In addition, I permitted testimony from witnesses regarding the reading of the notices which was part of the prior settlement. The General Counsel argues that, while these agreements are not proof of prior unfair labor practices, they "set the remedial bar" for future violations. The failure to impose similar remedies here, when the Respondent has engaged in unfair labor practices following execution of such a settlement agreement would be a step backward in ensuring that employees' Section 7 rights are vindicated.

The unfair labor practices found in this case, if viewed in isolation, would probably not warrant the special remedies sought by the General Counsel. The two acts of interrogation and the threat of plant closure were directed at one employee and there is no evidence of widespread dissemination of these unfair labor practices. The only unfair labor practice directed at a group of employees was Macey's threat of loss of benefits which has been proven to be made at two meetings with at least 30 employees present. Thus, unlike some of the cases cited by the General Counsel, the threats of plant closure and other adverse consequences of unionization were not made at meetings of the whole unit or in literature distributed to all employees. While the discriminatory treatment of Mabry, the "face of the Union," could be expected to have a chilling effect on other employees, a reinstatement and make-whole remedy would normally be sufficient to remove the chill. That being said, the unfair labor practices found here can not be considered in a vacuum.

The Respondent has a documented history of violating the Act, with unfair labor practices having been found after a hearing and affirmed by the Board. These unfair labor practices occurred within a year of the unfair labor practices found here.

[46] Accordingly, I shall reverse my ruling and receive the proffered exhibits, not as proof of any unfair labor practice alleged in those cases, but for the limited purpose described here.

In addition, the Respondent's proven unfair labor practices all occurred after it had entered into a formal settlement stipulation which required the Respondent to read the notice to employees and afford access to the Union similar to that requested here. Clearly, the prior remedies, even though voluntarily adopted, were not sufficient to prevent the Respondent from violating the Act. Under these circumstances, something more is required than the traditional notice posting to ensure that the Board's processes are not for naught.[47]

Accordingly, I find that the special remedies sought by the General Counsel are appropriate for the unfair labor practices found here and shall recommend that the Respondent read the notice and provide the Union access to its employees as requested by the General Counsel. See *Homer D. Bronson Co.,* 349 NLRB512, 515 (2007), and cases cited there. With respect to the special access provisions of the order, these are necessary because a third election must now be held due to objectionable conduct which includes the unfair labor practices. These additional measures will help to ensure that employees can exercise their right to vote in an atmosphere free of unlawful interference.[48]

[Recommended Order omitted from publication.]

[47] While the prior settlement agreement, with its nonadmission clause, is not proof that the Respondent committed any unfair labor practices, it is relevant history to consider in determining whether traditional remedies will be effective. The fact is, whether the Respondent committed any unfair labor practice, it voluntarily agreed that it would not violate the Act and even read the notice to employees assuring them it would not. Then, as found here and in the prior case, it committed unfair labor practices.

[48] In its brief, the Charging Party has requested reconsideration of my ruling denying its request for a bargaining order. I adhere to my earlier ruling. In addition, even assuming the Charging Party could demonstrate a card majority in 2001, when it filed the petition, the unfair labor practices found here and in the prior Board decision, which occurred in 2005 and 2006, would not be sufficient to warrant such an extraordinary remedy. I also note that the passage of time since the Union obtained majority support would make enforcement of any bargaining order unlikely. See *Homer D. Bronson Co.,* supra at 515.